No. 84-804

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In The

Supreme Court of the United States

October Term, 1984

ROYAL DRUG COMPANY, INC. d/b/a ROYAL PHARMACY OF CASTLE HILLS and DISCO PRESCRIPTION PHARMACY, BLAUSER'S PHARMACY, INC., PARKERS PHARMACY, INC., CRAIG BELL d/b/a BELL PHARMACY, GEORGE STONE d/b/a OLMOS PHARMACY, HIGHLAND HILLS PHARMACY, INC., ECONODOSE SYSTEMS, INC. d/b/a MEDICAL CENTER PHARMACY, GUSTIVE HRNCIR d/b/a TURNERS PHARMACISTS, CARLOS DIAZ d/b/a VALLEY VIEW PHARMACY, ALFRED SANGALLI d/b/a STAR DRUG STORE, BLANCO PHARMACY, INC., BLANCO SOUTHSIDE PHARMACY, INC., DAN PARADA d/b/a DAN'S PHARMACY, RODOLFO L. DAVILA, INC. d/b/a DAVILA PHARMACY, DELLMAR PHARMACIES, INC. d/b/a DELLMAR PHARMACY #4, RONG INC. d/b/a ECONOMY PHARMACY #1, ZARZAMORA PHARMACY, INC., and WHITE CROSS PROFESSIONAL PHARMACY, INC. d/b/a WHITE CROSS #1 and d/b/a WHITE CROSS #4,

Petitioners,

vs.

GROUP LIFE AND HEALTH INSURANCE COMPANY also known as BLUE SHIELD and/or BLUE CROSS BLUE SHIELD OF TEXAS, WALGREEN TEXAS COMPANY and THE SOMMERS DRUG STORE COMPANY also known as CORRIGAN ENTERPRISES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 1 of the Sherman Act is violated by competing pharmacists entering into identical agreements with Blue Shield fixing and establishing pharmacists' retail sales prices of prescription drugs to Blue Shield subscribers, knowing such pharmacists' competitors are signing identical contracts and knowing non-signing pharmacists are coerced to sign such Agreement because they will be boycotted by Blue Shield subscribers.

2. Whether Blue Shield is the purchaser of the prescription drug because it indemnifies subscribers for part of the drug cost.

3. Whether price fixing agreements are *per se* illegal under § 1 of the Sherman Act.

4. Whether a price fixing conspiracy becomes legal under the Sherman Act because one of the parties to it is a non-competitor of the other parties.

5. Whether a non-competitor who requires retail price fixing by competitors and engages in acts of coercion and boycott to force competitors to enter into the price fixing agreement may be liable under § 1 of the Sherman Act.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners file this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming Summary Judgment dismissing Petitioners' antitrust claims against Respondents.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas is annexed hereto in the Appendix ("App.") at App. 1.

The opinion of the United States Court of Appeals for the Fifth Circuit is printed in the Appendix at App. 12.

JURISDICTION

The Judgment of the Court of Appeals was entered on August 6, 1984, and is printed in the Appendix at App. 28. The order denying Petition for Rehearing is dated September 26, 1984 and is printed in the Appendix at App. 29. The jurisdiction of this Court is only invoked under 28 U.S.C., Section 1254(1).

STATUTE INVOLVED

This case involves Section 1 of the Sherman Act, 15 U.S.C. § 1, which reads as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."

REASONS FOR GRANTING WRIT

The decision of the Fifth Circuit and the cases on which it relied conflict with virtually every prior decision of this Court, failed to apply the settled *per se* rule to price fixing agreements, ignored the factual record and creates different antitrust rules applicable to pharmacists resulting in their loss of pricing freedom. The Fifth Circuit's decision is erroneous on the facts and on the law, and should be reversed to prevent any erosion of the *per se* rule against price fixing, the paradigm of antitrust violations.

STATEMENT OF THE CASE

This is an appeal from a Judgment of the United States Court of Appeals for the Fifth Circuit affirming Summary Judgment dismissing Petitioners' claims. This case has previously been before the Court in *Group Life & Health Ins. Company, et al. v. Royal Drug Company, Inc., et al.*, 440 U.S. 205 (1979) ("Royal Drug") wherein this Court held the challenged Pharmacy Agreements were not exempt from antitrust scrutiny under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

The prior appeal to this Court was on a limited record because the parties agreed to limit discovery to the McCarran Act issues only (Doc. 63).

In 1969 Blue Shield began offering indemnity for prescription drugs to both auto and non-auto groups in Texas. The policy was modeled after a prescription drug policy which began in Michigan as a result of the 1969 contract negotiations between General Motors Corporation, Chrysler Corporation, Ford Motor Company and the United Auto Workers. (Doc. 190, pp. 4-5.) Blue Shield thereafter offered this same type of prescription drug indemnity to other non-auto groups in Texas.[1] Blue Shield utilizes coercion to compel competing pharmacists to sign identical Participating Drug Pharmacy Agreements ("Agreement") and fix their prices on retail sales of prescription drugs. Non-signing pharmacists are denied Blue Shield subscribers' business because of the difference in reimbursement, and a Blue Shield created, more burdensome method of securing reimbursement which causes a boycott of non-signing pharmacists and coerces execution of the price fixing Agreement.

Blue Shield began securing the execution of the Agreement by retail pharmacists in Texas (Judith Johnson[2] Depo., Exhibit 19). There was a great growth in utilization of the policy. In October of 1975, the claims under the policy had grown to 31,000 per month compared to 1,000 per month in early 1972 — a 3,100% increase (Lee Helis[3] Depo., p. 9-10).

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[1]The form of the policy is Exhibit 37 to the deposition of Steve G. McDonald (McDonald Depo.).

[2]Ms. Johnson is Assistant Vice President of Blue Shield responsible for administration of Blue Shield's prescription drug program.

[3]Mr. Helis was Manager of the Special Claims Department of Blue Shield.

No document states that Blue Shield is the purchaser of the drugs. To the contrary, the deposition testimony of Respondents shows that the actual purchaser is the pharmacist's customer.

Blue Shield requires and coerces execution of the Agreement by independent retail pharmacists for them to be a "participating pharmacy." Failure to sign the Agreement causes a pharmacy to lose all business of Blue Shield subscribers. Where a subscriber purchases drugs from a participating pharmacy, the subscriber pays $2.00 and the pharmacist reecives a total price equal to a dispensing fee (originally $2.00), plus the acquisition cost of the drug, as defined by Blue Shield, less the $2.00 paid by the customer. Thus, the price which all participating pharmacists receive is identically fixed and set. The dispensing fee is uniform irrespective of the cost of the drug ingredients, the pharmacists' cost of operation, the services the pharmacists provide, and irrespective of the increase in the cost of doing business or the general cost of living.

In the fifteen years since 1969, the $2.00 dispensing fee has been increased only twice. In 1976 it was increased 10% to $2.20, although the cost of living had increased 55.2%. In 1981 it was increased to $3.00, a 50% increase in 15 years. (Document 190, p. 3.) During this 15 years, the cost of living increased 162%. United States Department of Commerce, 22nd Biennial Edition of Business Statistics, p. 205; Council of Economic Advisers, Economic Indicators, p. 23 (May, 1983).

The result of the Agreements between the pharmacists and Blue Shield is an agreement to fix, set, establish and maintain uniform markup and retail prices among com-

peting pharmacists. Petitioners are independent pharmacists who have all of the risks of doing business, must purchase inventory, advertise, merchandise, and attempt to secure and keep customers through furnishing of services. Petitioners have all the risks of independent businessmen, except the right to determine their own prices for sales to Blue Shield subscribers.

To obtain any business of Blue Shield subscribers, the pharmacy must be a participating provider; i.e., one who has entered into a written contract for the rendition of covered drugs for which benefits are provided (McDonald[4] Depo., Exhibit 37). If this was all that the Blue Shield program required, any pharmacist would be glad to sign an agreement to furnish covered drugs. However, the Pharmacy Agreement does more. As shown above, the pharmacist's price is set without regard to the myriad of factors which go into determining price in a competitive market. All participating pharmacists receive an identical price — dispensing fee plus acquisition cost less $2.00. Thus, the dispensing fee is what is available to pay the pharmacists' cost of doing business and profit. The dispensing fee does not vary, nor have any relation to the pharmacists' business costs, nor to the drug acquisition cost which may be most substantial. Whether the drug acquisition cost is $8.00 or $80.00, the pharmacists receive only the dispensing fee which was $2.00 until 1976, then increased to $2.20, and subsequently increased in 1981 to $3.00. A pharmacist who does not execute the Agreement is a non-participating provider and is boycotted.

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[4]Mr. McDonald is Vice President, Staff Counsel of Blue Shield.

All pharmacists who sign the Agreement are parties to a plan or program under which they agree to fix their retail price at identical levels and according to a uniform formula. Price competition thus disappears and because of the inadequate dispensing fee, the pharmacists may not be able to compete by provision of services.

Respondent Walgreen is probably the largest drug company in the world just as Blue Shield is one of the largest health care insurers, and Respondent Sommers, now Corrigan Enterprises, Inc., was a large independent drug chain in San Antonio and other areas in Texas. (Johnson Depo., Exhibit 17, pp. 62-63, 66.)

Recognizing that few pharmacists would agree to abrogating their pricing freedom and the ability to respond to changing business conditions, Blue Shield compels pharmacists to execute the Agreement by utilizing a different and less favorable method of reimbursement and a more burdensome method of reimbursement to subscribers who patronize non-participating pharmacists. An insured who patronizes a participating pharmacy pays the $2.00 fee. The pharmacist then submits the claim to Blue Shield and is reimbursed directly by Blue Shield. Where the subscriber purchases his drugs from a non-participating pharmacy, the subscriber must pay the entire price of the drug, submit a claim to Blue Shield, which will in all probability be rejected, but when the claim is paid the subscriber receives benefits of 75% of a reasonable charge for the drugs as determined by Blue Shield less the drug deductible. (McDonald Depo., Exhibit 39; Johnson Depo., Exhibit 2, p. III-6.) There are no studies which justify this difference (Johnson Depo., p. 27, 34-35).

Significantly, if the subscriber purchases from an out of state non-participating pharmacy, he is reimbursed

100% of his drug cost. Coercion in that instance would serve no purpose since it would not coerce pharmacists in Texas where Blue Shield operates, thus, the full payment that the subscriber has made upon *his purchase* is reimbursed.

Subscribers quickly learn to patronize only participating pharmacists and to boycott all others. Of the 31,000 prescription claims per month processed by Blue Shield in late 1975, approximately 600 per month (1.9%) were filled by non-participating pharmacists. (Helis Depo., p. 10-13.) The boycott of non-participating pharmacists and the coercion utilized by the Blue Shield program are obvious. If the participating pharmacists secure over 98% of the business of Blue Shield subscribers, non-participating pharmacists receive only 1.9%. Indeed, in some groups all subscribers patronize only participating pharmacists. (See Exhibits B and D to Plaintiffs' Response to Motion for Summary Judgment.) The coercion is most successful and the result is an almost total boycott of non-participating pharmacists by subscribers. Plaintiffs are unaware of any more successful boycott or coercion in any line of business in the United States.

Other than the difference in reimbursement, the coercion is not set out in any manner in the policy. It only appears in Blue Shield's drug manual issued to the pharmacy after it signs the Agreement. The manual provides,

> "Non-Participating Pharmacist: *No payment will be made under this program to a non-participating pharmacist.* There is a provision to pay to the member on a reimbursement basis for some of *his costs* for covered drugs." (Johnson Depo., Exhibit 2) (Emphasis added)

By this provision, Blue Shield admits that the subscriber has incurred the costs and is the purchaser of the drug where he deals with a non-participating pharmacist.

The policy provides in Section C, Article III,

> "C. *Payment of benefits* by the Insurer to the provider or to the Employer, as the Insurer may elect, shall constitute full discharge of all responsibility of the Insurer to the employee on account of care rendered to any participant under his coverage." (McDonald Depo., Exhibit 37) (Emphasis added)

There is no provision in the Agreement, the policy, nor in any document in the record which provides that Blue Shield is the purchaser of the drugs. The deposition testimony is clearly to the contrary. Blue Shield itself says in the Agreement,

> "Blue Shield is the *underwriter* of the insurance protection only." (Johnson Depo., Exhibits 15, 19) (Emphasis added)

The administrative hassle created by Blue Shield is part of its coercively induced boycott, even though in most instances the non-participating pharmacist prepares the claim form for the customer (Johnson Depo., Exhibit 2 at III-4 to III-6). Any alleged additional cost in dealing with a member who patronizes a non-participating pharmacist exists solely because Blue Shield has created the extra cost. The requirement in the policy for the "written contract" (Agreement) does not require that pharmacists must agree to fix their retail prices. Blue Shield coercively creates a boycott to force pharmacists to enter into the price fixing Agreement.

Blue Shield filed one form of Pharmacy Agreement with the State Board of Insurance (Johnson Depo., Exhibit 1), but in actuality used another form of Pharmacy Agreement. (Johnson Depo., Exhibits 15, 19) The Pharmacy Agreement filed with the State of Texas provides in part as follows:

> "6. All contracts or transactions in which the Participating Pharmacy engages in involving dispensing of

drugs shall be between the Participating Pharmacy and the patient and Blue Shield *hall not be a party thereto.*

. . .

9. This agreement may be terminated at any time by either party by giving at least 15 days prior written notice to the other party." (Johnson Depo., Exhibit 1) (Emphasis added)

The identical, uniform Pharmacy Agreements signed by the competing pharmacists do not have paragraph 6 but instead provide,

"Blue Shield is the underwriter of the insurance protection only." (Johnson Depo., Exhibits 15 and 19)

By 1975, over ⅓ of the pharmacists in Texas had signed the Pharmacy Agreement (Johnson Depo., Exhibits 27 and 28) and 115 San Antonio pharmacists had signed the Pharmacy Agreement (Johnson Depo., p. 43).[5] Each participating pharmacy knows that his competitors who sign the Pharmacy Agreement will be charging the same prices (Johnson Depo., Exhibit 2) and that Blue Shield will not deal with a pharmacist who has refused to agree on prices (Johnson Depo., Exhibit 2). Except for Blue Shield requiring a pharmacist to surrender pricing freedom and fix his sales price, every pharmacy would agree to furnish covered drugs. There would be no reason not to do so.

By combining with the defendant pharmacy chains and others (Johnson Depo., Exhibits 8, 15, 17-22) having many outlets, Blue Shield guarantees its subscribers will not have

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[5]The Fifth Circuit in the prior appeal of this case held that the Pharmacy Agreement goes beyond Blue Shield's obligations under the prescription drug plan. *Royal Drug Co., et al. v. Group Life & Health Ins. Co., et al.*, 556 F.2d 1375, 1381-82 (5th Cir. 1977). This Court agreed recognizing that Blue Shield is only attempting to minimize its costs in fulfilling *its underwriting obligations.* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 213, 214 (1979).

to choose between geographical inconvenicence and reduced policy benefits. The insured will generally find one of the pharmacy chains' outlets to be readily accessible. The large chains help guarantee that the sole factors in the subscriber's mind will be the markedly reduced policy benefits and administrative burden if he patronizes a non-signing pharmacy.

Blue Shield has consciously utilized these factors as can be seen in its inter-office correspondence. When defendant Sommers decided to join the price fixing conspiracy, one member of Blue Shield's management admitted, "Our entire Foundation Program [Bexar County] would not have been successful without them . . ." (Johnson Depo., p. 61 and Exhibits 12 - 13).

Walter Corrigan, former president and designated corporate representative of defendant Sommers Drug Stores, now Corrigan Enterprises, Inc., testified that the sale of the prescription is to the individual whose name is on the prescription, that person is the customer and that is who he (Sommers) is selling to. Who the drug is sold to does not change if the particular customer in question has a third party insurance company (Corrigan Depo., p. 50). The cost of doing business increased about the same as the cost of living (Corrigan Depo., p. 53).

Martin Rubin's affidavit (Exhibit N to Plaintiffs' Response to Motion for Summary Judgment) shows Sommers knew competitors were signing the Pharmacy Agreement and that is why Sommers did so. Mr. Corrigan told him this.

Mr. Michael Bordelon of Sommers Drug Stores was called on by David Thigpen of Blue Shield about the program in 1974 (Bordelon Depo., p. 9). He thought the $2.00 fee was low (Bordelon Depo., p. 15) and hardly allowed

them to break even due to the cost of administering the program (Bordelon Depo., p. 16). He knew that if you did not enter into the program *you would not get the prescription business* (Bordelon Depo., p. 19). Mr. Bordelon knew that the professional dispensing fee *was the same* for all pharmacists and that this was part of the Blue Shield program (Bordelon Depo., p. 23). There were discussions with David Thigpen of Blue Shield about how important to Blue Shield it was to have Sommers Drug Stores as a participating pharmacy (Bordelon Depo., p. 27). He knew that the participating pharmacy gets the business (Bordelon Depo., p. 37).

Charles D. Hunter, Executive Vice President of Walgreen Company, the parent company of Walgreen Texas Company, testified that third party programs do specify what Walgreen will receive and that is a general characteristic (Hunter Depo., p. 15). Blue Shield is merely the plan administrator (Hunter Depo., p. 53). Walgreen had the general understanding that the agreement being presented to them was the same as the agreement being presented to others (Hunter Depo., p. 57). The person paying the co-pay is the "customer". The Pharmacy Agreement limits Walgreen's charges and sets a maximum price (Hunter Depo., p. 59, 61).

Mr. William H. Hatfield of Walgreen Company testified third party plans such as the Texas Blue Shield plan must be priced according to the terms of the contract (Hatfield Depo., p. 17). He further testified the Pharmacy Agreement is the *only* justification for their receiving the same dispensing fee irrespective of the cost of the drug. Walgreen would probably not charge the same to a cash and carry customer. There is more administrative work in handling a Blue Shield claim than in a sale to a cash and carry customer (Hatfield Depo., p. 20).

Mr. Jerome B. Karlin, Regional Vice President of Walgreen Company, testified as follows,

> "Q. Who would be the purchaser of the prescription drug?
>
> A. The recipient of the prescription drug." (Karlin Depo., p. 88)

Blue Shield is the administrator of the program (Karlin Depo., p. 88).

There is a different sales price to customers who have third party plans. They are paid on a cost plus fee basis. Walgreen does not have a cost plus fee basis with the cash and carry customer (Karlin Depo., p. 16). With respect to cash and carry customers, Walgreen's policy is to have a competitive price schedule within the given market. Each item is individually priced based on the competitive nature of the item (Karlin Depo., p. 18). In third party contracts, they are limited by what the contract calls for *as the price has been set* (Karlin Depo., p. 21). If Blue Shield did not pay a customer's claim, he would try to collect the money. If there was no coverage for it, he would collect the money from the *customer* (Karlin Depo., p. 95-96).

The pharmacy who sells the drug to the customer is not a party to the policy in any respect! Yet the Agreement, which the Fifth Circuit and this court have found, goes beyond Blue Shield's policy obligation, is utilized to fix retail sales prices of prescription drugs sold by pharmacists to their customers who are Blue Shield subscribers. If the pharmacist wishes to retain his pricing freedom, his sales to Blue Shield subscribers disappear. The program as created and utilized by Blue Shield thus results in participating pharmacists entering into the Agreement knowing their competitors are doing the same. If they do not, the pharmacists will be boycotted by Blue Shield subscribers and are thus coerced to enter into the Agreement.

Even though the pharmacists are independent businessmen, they lose the ability to determine their retail prices. The pharmacist is thus compelled to underwrite part of Blue Shield's obligations by becoming a participating pharmacist.

Recognizing there might be antitrust problems, it was suggested the Agreement be camouflaged as a mass accounting agreement (Johnson Depo., Exhibit 32). There is no testimony or documents in the record showing any studies by Blue Shield as to the adequacy or fairness of the dispensing fee to the pharmacists.

Both this Court and the Fifth Circuit have already recognized that Blue Shield has gone beyond its policy obligations. In fact, Blue Shield in the prior appeal of this case to this Court stated,

> "In consideration of the premium, Blue Shield agrees to contract with Participating Pharmacies to furnish drugs to its insureds and to reimburse the pharmacists *on behalf of the insureds* for each prescription filled." Brief for Petitioners, p. 12 (Emphasis added)

The insured makes the purchase, but reimbursement *on his behalf* may be made directly to the pharmacy.

ARGUMENT

Price Fixing Agreements Are Illegal Per Se

Since the inception of the Sherman Act, this Court has always held that price fixing is *per se illegal.* The Fifth Circuit's opinion in this case and the cases therein relied upon at App. 18 directly conflict with numerous decisions of this Court uniformly so holding. This Court has recently reemphasized and held in no uncertain terms that

price fixing is *per se* illegal. *State of Arizona v. Mariocopa County Medical Society,* 457 U.S. 332 (1982); *Monsanto Company v. Spray-Rite Service Corp.,* 1984-1 Trade Cases, p. 67,871; *Copperweld Corp. v. Independence Tube Corp.,* 1984-2 Trade Cases, p. 65,901. This holding is far from new. *Simpson v. Union Oil Company of California,* 377 U.S. 13 (1964); *United States v. Trans-Missouri Freight Association,* 166 U.S. 290 (1897); *United States v. Socony-Vacuum Oil Co., Inc.,* 310 U.S. 150 (1940); *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643 (1980). Contrary to this well established *per se* rule, the district court and the Fifth Circuit nevertheless held that the Pharmacy Agreements at issue were to be analyzed under the rule of reason even though Respondents filed no affidavits negating fact issues under the Rule of Reason. As a result, the *per se* rule applies to every business except pharmacists.

The decision of the Fifth Circuit in this case is contrary to, conflicts with and fails to follow the numerous prior decisions of this Court cited above as well as numerous others. Thus by judicial fiat, the lower courts have repealed the *per se* rule applicable to price fixing where pharmacists are involved.

This Court recently stated:

> "We have not wavered in our enforcement of the per se rule against price fixing. Indeed, in our most recent price fixing case we summarily reversed the decision of another Ninth Circuit panel that a horizontal agreement among competitors to fix credit terms does not nuecessarily contravene the antitrust laws." *State of Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 347, 348 (1982).

In *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 221 (1940), this court held that whether the fixed prices were reasonable (they are not here) made no difference and that:

> "*Any* combination which tampers with price structures *is engaged in an unlawful activity*. . . . The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price fixing schemes are wise or unwise, healthy or destructive." (Emphasis added)

What the Fifth Circuit did was what this Court in *Maricopa* said should not be done:

> "We are equally unpersuaded by the argument that we should not apply the per se rule in this case because the judiciary has little antitrust experience in the health care industry. The argument quite obviously is inconsistent with *Socony-Vacuum*. In unequivocal terms, we stated that, '[w]hatever may be its perculiar problems and characteristics, the Sherman Act, so far as price fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.' 310 U.S., at 222, 60 S.Ct., at 843. . . . Finally, the argument that the per se rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for per se rules, which in part is to avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable — an inquiry so often wholly fruitless when undertaken.' *Northern Pac. R. Co. v. United States, supra,* 356 U.S., at 5, 78 S.Ct., at 518." *State of Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 349, 350, 351 (1982).

In short, the Fifth Circuit, contrary to numerous Supreme Court decisions, made its own decision that the *per se* rule must be rejustified in this case and then refused to apply it.

The Fifth Circuit held that the agreements have potential pro-competitive justifications (App. 22) but none

are shown in the record. In *Maricopa,* this Court rejected such an argument stating:

> "The respondents' principal argument is that the per se rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the per se concept. The anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if procompetititive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its *general* application." *State of Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 351 (1982) (Emphasis added)

The Fifth Circuit's entire opinion is legally invalid and contrary to settled decisions of this Court, ignores the facts in the record, conflicts with prior decisions of this Court, and creates one of the broadest possible exceptions to the antitrust laws—an exception which will permit competitors to escape the proscriptions of the Sherman Act by contracting with a non-competitor, knowing their competitors are entering into identical contracts, which result in fixed retail prices to their customers. What the Fifth Circuit did was to decide this case based on its own view of what the law *should be* rather than what this Court has uniformly held *it is* for some 87 years. This Court has held only Congress may change the *per se* rule. *State of Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 354, 355 (1982),

> "Our adherence to the per se rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. *United States v. Topco Associates, Inc., supra,* 405 U.S., at 611-612, 92 S.Ct., at 1135. Given its generality, our enforcement of the

> Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the per se rule in this case therefore are better directed to the legislature. Congress may consider the exception that we are not free to read into the statute."

The agreements here clearly fix maximum prices. Blue Shield created the price fixing agreement and secures the competitors' agreement to it by undisputed and most effective coercion—an almost total boycott of non-participating pharmacists.

This case presents a clear conflict between the decisions of the Courts of Appeal and long standing, well established, recently reaffirmed decisions of this Court regarding the applicability of the *per se* rule to price fixing agreements.

The Fifth Circuit further stated that Blue Shield acts as a guardian for the consumer here because they have the consumer's interest at heart in keeping prices low. (App. 24.) However, Congress has not delegated to Blue Shield or any other private corporation such authority. Indeed, the Sherman Act and numerous decisions of this Court clearly mandate that free and unfettered competition serve the best interest of consumers. The Court can readily appreciate the economic havoc that would result if insurers were able to fix and set retail prices in every transaction where a customer might have indemnity from an insurer. The Sherman Act has served as a strong shield for the pricing independence of independent business entities. This protection should not be withdrawn or weakened.

Non-Competitors Are Not Exempt From The Sherman Act

In *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960) and *Simpson v. Union Oil Company of California, supra,* this Court clearly held that coercion could not be used to achieve resale price maintenance. *Simpson* involved bilateral contracts between Union Oil (a non-competitor) and its lessees, and Union Oil fixed the lessees' retail prices just as Blue Shield does here. The holding of *Simpson* is fully applicable here. There the court stated:

> "Here we have such an agreement; it is used coercively, and, it promises to be equally if not more effective in maintaining gasoline prices than were the Parke, Davis techniques in fixing monopoly prices on drugs." *Simpson v. Union Oil Company of California,* 377 U.S. 13, 19 (1964)

In this case there is no *promise* of effectiveness of the coercion and boycott. It is totally effective and undisputedly exists.

The *Simpson* court further stated at pp. 20-21:

> "Dealers, like Simpson, are independent businessmen; and they have all or most of the indicia of entrepreneurs, except for price fixing. The risk of loss of the gasoline is on them, apart from acts of God. Their return is affected by the rise and fall in the market price, their commissions declining as retail prices drop. Practically the only power they have to be wholly independent businessmen, whose service depends on their own initiative and enterprise, is taken from them by the proviso that they must sell their gasoline at prices fixed by Union Oil. By reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive."

The effect of the "consignment" in *Simpson* and Blue Shield's program in this case,

> ". . . is its inexorable potentiality for and even certainty in destroying competition in retail sales . . . by these nominal 'consignees' who are in reality small struggling competitors seeking retail . . . customers." *Simpson, supra* at 21.

Further, at p. 22 *Simpson* rejected arguments of form over substance stating:

> "The present, coercive 'consignment' device, if successful against challenge under the antitrust laws, furnishes a wooden formula for administering prices on a vast scale."

Simpson concluded that to allow Union Oil to achieve price fixing through the "consignment" device,

> ". . . would be to make legality for antitrust purposes turn on clever draftsmanship. We refuse to let a matter so vital to a competitive system rest on such easy manipulation."

The court concluded at p. 24,

> ". . . there is nothing left to try, for there was an agreement for resale price maintenance, coercively employed."

Price fixing is not limited to agreements between competitors to pay or charge specific or uniform sums.

> "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)." *Accord, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980)

The particular form of combination is irrelevant to *per se* illegality.

> "*Any combination* which tampers with price structures is engaged in an unlawful activity. . . . The Act places *all* such schemes beyond the pale and protects that

> vital part of our economy against any degree of interference. Congress *has not* left with us the determination of whether or not particular price fixing schemes are wise or unwise, healthy or destructive." *United States v. Socony-Vacuum Oil Co., Inc.,* 310 U.S. 150, 221 (1940) (Emphasis added)

In *United States v. Masonite Corp.,* 316 U.S. 265 (1942), this Court found a violation of the Sherman Act despite the following facts:

> "[Each defendant] acted independently of the others, negotiated only with Masonite, desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others." *United States v. Masonite Corp.,* 316 U.S. 265, 275 (1942).

Masonite's unilateral designation of price without consulting the others did not preclude liability.

> "The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action." *Masonite, supra* at 276.

Albrecht v. Herald Company, 390 U.S. 145 (1968) also rejected Blue Shield's unilateral argument holding:

> "The combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination." *Albrecht v. Herald Company,* 390 U.S. 145, 149 (1968).

and pointed out in n. 6, p. 150:

> "Likewise, he (petitioner) might successfully have claimed that respondent had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it." *Albrecht v. Herald Company, supra.*

Maximum price fixing is illegal *per se. Fashion Originators' Guild of America, Inc. v. Federal Trade Com-*

mission, 312 U.S. 457, 467 (1941) quoting *United States v. Trans-Missouri Freight Association, supra; Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951) (such agreements cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment). *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969) (reciprocal exchange of pricing information by competitiors stabilizing prices at a downward level *per se* unlawful because it interfered with the setting of prices by free market forces).

The Fifth Circuit showed its misunderstanding of settled antitrust decisions of this Court when it stated on p. 5217 that there could be no illegal horizontal combination because the agreements do not run between competitors and because Blue Shield "does not compete with pharmacies". This is a shocking and total departure from prior, well settled decisions of this Court and directly conflicts with such decisions. The patent invalidity and conflict with this Court's prior decisions is illustrated by the above decisions and by the following cases among numerous others: *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, supra; United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978). *See also United States v. United States Gypsum*, 333 U.S. 364, 394 (1948) stating:

> ". . . One of the things those two cases establish is the principle that when a group of competitiors enters into a series of separate but similar agreements with competitors *or others*, a strong inference arises that such agreements are the result of concerted action." (Emphasis added)

As early as 1911 this Court likewise rejected what the Fifth Circuit here held stating:

> "As to this, the complainant can fair no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result by agreement with each other." *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911).

To the same effect is *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), combination of manufacturers, distributors and the defendant retailer. *See also Monsanto Co. v. Spray-Rite Service Corp.*, 1984-1 Trade Cases, p. 67 [illegible]1, where Monsanto, a non-competitor, and some of its distributors conspired to fix the retail prices.

Price fixing is the clearest proscription of the Sherman Act.

> "Price is the 'central nervous system of the economy,' . . . and an agreement that 'interfere[s] with the setting of prices by free market forces' is illegal on its face." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), quoting in part, *United States v. Container Corp.*, 393 U.S. 333, 337 (1969).

Blue Shield Is Not The Purchaser

In this Court's decision in *Royal Drug*, it clearly stated the merits of the case were not before it and that it was not deciding the merits. *Royal Drug, supra*, at 209, footnote 5. This was again stated in the clearest possible terms in *Maricopa* wherein the court in n. 26, p. 353 stated:

> " . . . Nor does this case present the question whether an insurer may, consistent with the Sherman Act, fix the fee schedule and enter into bilateral contracts with individual doctors. That question was not reached in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 59 L.Ed.2d 261, 99 S.Ct. 1067 (1979). See *id.*, at 210, n. 5, 99 S.Ct. at 1072, n. 5."

Despite this Court's clear pronouncement in both *Royal Drug* and in *Maricopa,* the Fifth Circuit in its opinion at App. 23 relied upon the language of this Court in its opinion in *Royal Drug, supra* at 214, stating the pharmacy agreements:

> " . . . are merely arrangements for the purchase of goods and services by Blue Shield." *Group Life & Health Ins. v. Royal Drug Co.,* 440 U.S. 205, 214 (1979).

The ignored next sentence of this Court's language reads:

> " . . . By agreeing with pharmacies on the maximum prices it will pay for drugs, Blue Shield effectively reduces the total amount it must pay *to its policyholders.* The Agreements thus enable Blue Shield to minimize costs and maximize profits. Such cost-savings arrangements may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the 'business of insurance.' " *Group Life & Health Ins. v. Royal Drug Co.* 440 U.S. 205, 214 (1979). (Emphasis added)

Blue Shield is paying benefits because its policyholders made the purchases. Petitioners believe that this Court should be taken at its word—that it did not decide the merits. Indeed, the Fifth Circuit's opinion, as well as the cases relied on therein at App. 18,[6] held that despite this Court's two clear statements that it did not decide the merits, it nevertheless did so! The prior appeal of *Royal Drug* to this Court involved a limited record in that the parties agreed to limit discovery to the McCarran Act issues (Doc. 63). That was the record upon which this

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[6]The cases cited also conflict with this court's opinions herein cited, involved different conspiracies, refer to no testimony as to who is the actual purchaser and refuse to apply the *per se* rule where pharmacies are involved.

Court decided *Royal Drug*. There is no document in this record now(nor was there *then*) that states that Blue Shield is the purchaser of the drugs. Blue Shield's policy and the Pharmacy Agreement were prepared by it. If a purchaser status was intended, it would have been stated. As shown above, this record shows the pharmacy's customer is the purchaser. Nevertheless, the Fifth Circuit held Blue Shield was a purchaser offering to deal with the pharmacists on prices it unilaterally set.[7]

Petitioners continually argued the undisputed facts in the record on the purchaser question. That is, that there was no evidence that Blue Shield was anything other than what it described itself as—an indemnitor. There is no evidence in the record to the contrary.

The decision of the Fifth Circuit in this respect, as well as the decisions of the other cases it relied upon, have broad, horrendous all encompassing consequences and would create a broad exception to the antitrust laws. This fiction would permit insurers and competitors to violate the antitrust laws with impunity. The insurance industry could destroy price competition with respect to every purchase of services or products by someone having insurance indemnifying against all or part of the cost of such services or products, and apply it to all aspects of health care,

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[7]The language in the Fifth Circuit's opinion (App. 23) that plaintiffs' counsel conceded at oral argument that it was immaterial to this case whether Blue Shield is considered a purchaser or indemnitor is totally incorrect, as well as most embarrassing to counsel for petitioners who has fought this case for ten years, and is contrary to the facts in the record, facts which Blue Shield does not dispute with any document or testimony. Plaintiffs' counsel argued that because of the presence of the coercion and boycott, reversal was proper irrespective of the purchaser issue.

home insurance, automobile insurance and to virtually every area of our society where insurance protection exists.

This Court has never held prices could be set absent evidence of the presence and abuse of monopoly power. Yet that is what the Fifth Circuit held. (App. 24.) The Fifth Circuit's opinion goes even further at Section B, App. 22 wherein it states Blue Shield's method of competition seeks to bring *its customers* the maximum insurance reimbursement. They *have* maximum insurance reimbursement. The Blue Shield policy provides that the customer shall pay only $2.00. The balance of the prescription drug cost is to be paid by Blue Shield. As this Court held in *Royal Drug* and as the Fifth Circuit held, the Pharmacy Agreement is only for the benefit of Blue Shield. *Group Life & Health Ins. Co. v. Royal Drug Company,* 440 U.S. 205, 212 (1979); *Royal Drug Company, Inc., et al. v. Group Life & Health Insurance Co., et al.,* 556 F.2d 1375 (5th Cir. 1977) p. 1381.

As set out above, this Court has recognized on numerous occasions, including *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972) and *Maricopa, supra,* that only Congress can amend the antitrust laws. Yet, the Fifth Circuit's opinion and the cases cited therein, by judicial fiat have amended the antitrust laws to appoint insurers as guardians of consumer interests. In short, they have done what Congress has not done and what this Court said can only be done by Congress.

Petitioners Showed The Requisite Contract And Combination

As this Court has stated in *Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 142 (1968):

> "In any event each petitioner can clearly charge a combination between Midas and himself, as of the day unwillingly complied with the restrictive franchise agreements, Albrecht v. Herald Co., 390 U.S. 145, 150, n. 6, 88 S.Ct. 869, 872, 19 L.Ed.2d 998 (1968); Simpson v. Union Oil Co., supra, or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by 'the communicated danger of termination,' United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372, 87 S.Ct. 1856, 1862, 18 L.Ed.2d 1249 (1967); United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960) . . ."

Acquiescence alone has been held sufficient to establish the requisite contract, combination and conspiracy. *See Albrecht v. Herald Co., supra,* at 149; *United States v. Parke, Davis & Co., supra* at 44. *See also Monsanto Co. v. Spray-Rite Service Co., supra,* n. 9, p. 67,877.

There Is Coercion And A Boycott

The legal invalidity which permeates the Fifth Circuit's opinion is perhaps most graphically illustrated on App. 26 of the Fifth Circuit's opinion where it resolved the coercion and boycott issues by determining whether there was a benefit to Blue Shield. This Court has uniformly held such reasons will not save an antitrust violation. *United States v. Socony-Vacuum Oil Co., supra* at 213, 221; *United States v. Container Corp. of America, supra; United States v. McKesson & Robbins, Inc.,* 315 U.S. 305, 310 (1956); *United States v. Masonite Corporation, supra* at 276; *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, supra* at 467; *United States v. Trans-Missouri Freight Association, supra* at 323; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., supra* at 213; *Maricopa, supra* at 352, n. 25.

A combination or conspiracy to effect a refusal to deal or boycott is a *per se* violation of § 1 of the Sherman Act. *See, e.g., Klors, Inc. v. Broadway-Hale Stores, Inc., supra; Fashion Originators' Guild v. Federal Trade Commission, supra; Eastern States Retail Lumber Dealers' Assn. v. United States,* 234 U.S. 600 (1914); *Williams v. St. Joseph Hospital,* 629 F.2d 448 (7th Cir. 1980); *Beech Cinema, Inc. v. Twentieth Century-Fox Film Corp.,* 622 F.2d 1106 (2nd Cir. 1980).

> The philosophy underlying this condemnation is clear. "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a *common plan* which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete . . ." *Associated Press v. United States,* 326 U.S. 1, 15 (1945). (Emphasis added)

It is only because Blue Shield created a plan which drastically penalizes non-signing pharmacists that it can force execution of the Pharmacy Agreement and the consequent price fixing by competitors.

This Court should keep in mind the following:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion tha it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote

greater competition in a more important sector of the economy." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

The Fifth Circuit Ignored Well-Settled Summary Judgment Rules

The record is totally devoid of any affidavit showing any pro-competitive effects under the rule of reason.[8]

The test under the rule of reason is whether the restraint promotes competition or suppresses or destroys it. *United States v. Topco Associates, Inc., supra; National Society of Professional Engineers v. United States, supra* at 688, 691. Until Blue Shield filed affidavits showing that there were no fact issues under the rule of reason, plaintiffs were not required to file any counter affidavits. Rule 56, Federal Rules of Civil Procedure. *Solomon v. Houston Corrugated Box Co., Inc.*, 526 F.2d 389, 393 (5th Cir. 1976). Apparently the Fifth Circuit assumed that because petitioners filed no affidavits, they could not do so. Nevertheless, the record is clear that Blue Shield did not even attempt to eliminate any fact issues under the rule of reason. Under the clear provisions of Rule 56, petitioners had no duty to come forward with a counter affidavit. There is nothing in the record showing competition is enhanced by price fixing, coercion and boycott.

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[8]The Fifth Circuit's opinion cites none and erroneously claims that plaintiffs pleaded no anti-competitive effect. There is nothing more anti-competitive than price fixing which was pleaded.

CONCLUSION

This case involves much more than the Petitioners alone. Blue Shield's brief in the Fifth Circuit claims Aetna Life Insurance Company, Metropolitan Life Insurance Company and others use similar plans. (Brief for Appellee Group Life and Health Insurance Company, n. 6.) The Fifth Circuit's opinion is wrong on the law, ignores the record and fails to apply settled long standing decisions of this Court and conflicts with such decisions. Pricing freedom is eliminated to enhance insurer profits[9] through coercion and boycott.

The Writ of Certiorari should be granted and this case should be reversed.

Respectfully submitted,

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[9]There is no evidence that Blue Shield's premiums are lower because of the program at issue.

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-75-CA-131

ROYAL DRUG COMPANY, INC. dba ROYAL PHARMACY OF CASTLE HILLS and DISCO PRESCRIPTION PHARMACY, et al.,

Plaintiffs,

vs.

GROUP LIFE AND HEALTH INSURANCE COMPANY, aka BLUE CROSS and/or BLUE CROSS BLUE SHIELD OF TEXAS, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed July 7, 1983)

This an antitrust case challenging provisions of the prepaid prescription drug insurance program run by Defendant Blue Cross-Blue Shield of Texas (hereinafter "Blue Cross"). Defendants seek summary judgment. Having fully considered the motion, it will be granted.

Two features of the program form the basis of the complaint. Under the terms of their insurance policies, Blue Cross' insureds may acquire prescription drugs at any licensed pharmacy. If, however, they deal with certain pharmacies that have signed participating pharmacy agreements with Blue Cross, insureds are entitled to acquire prescriptions upon payment of a set two dollar dispensing fee. Thereafter, Blue Cross reimburses the pharmacy for the cost of the prescription, but only up to a maximum reimbursement price set pursuant to the terms of the participating pharmacy agreements. Plaintiffs claim this maximum reimbursement price provision is

price-fixing, a *per se* violation of section 1 of the Sherman Act, 15 U.S.C. § 1.

If insureds deal with a non-participating pharmacy, they must pay the full price of the prescription, then file a reimbursement claim. Reimbursement is limited to seventy-five percent of the cost. Thus, the insurance policies provide cost, time, and convenience incentives to insureds to deal with participating pharmacies.[1] Plaintiffs claim these discriminatory reimbursement provisions amount to a group boycott of non-participating pharmacies, also a *per se* violation of section 1 of the Sherman Act.

A.

Plaintiffs characterize the alleged price-fixing conspiracy between Blue Cross and the participating pharmacies as one that is simultaneously horizontal and vertical. Plaintiffs' Response to Motion for Summary Judgment at 14,36 (hereinafter "Response"). A horizontal combination is one between competitors. *Sports Center, Inc. v. Riddle, Inc.*, 673 F.2d 786, 790 (5th Cir. 1982). Consequently, the horizontal element of the alleged conspiracy depends in part on whether Blue Cross is in competition with pharmacies.

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1. The advantage of dealing with a participating pharmacy is illustrated in *Group Life & Health Insurance Co. v. Royal Drug*, 440 U.S. 205, 209 n. 3 (1979). The relevant terms of both the participating pharmacy agreements and the insurance policies are summarized in Plaintiffs' brief in response to the motion for summary judgment at 15-19 and Defendant Blue Cross' brief at 2-4. A copy of a prescription drug insurance policy is attached as Exhibit H to Plaintiffs' brief. Participating pharmacy agreements and a related manual are attached as Exhibits I, J and K.

It is undisputed that Blue Cross *does not* engage in the sale or dispensing of prescription drugs. McDonald Affidavit at ¶ 19 (filed March 30, 1983). Blue Cross occupies the role of a purchaser. Because the insurance policies entitle insureds to prescriptions for a set two dollar fee, individual insureds have no immediate interest in minimizing either the price or quantity of drugs consumed. It is Blue Cross, the ultimate payer, that has the cost-minimizing and consumption-minimizing interests traditionally associated with the buyer. The pharmacy agreements are "arrangements for the *purchase* of goods and services by Blue Shield" through which Blue Shield attempts to minimize its costs and maximize its profits. *Royal Drug, supra,* 440 U.S. at 214 (emphasis added). *See also, St. Bernard Hospital v. Hospital Service Association,* Inc., 618 F.2d 1140, 1145 (5th Cir. 1980); *Sausalito Pharmacy, Inc. v. Blue Shield of California,* 544 F.Supp. 230, 233 (N.D. Cal. 1981), *aff'd* 677 F.2d 47 (9th Cir. 1982), *cert. denied,* — U.S. —, 103 S.Ct. 376 (1982); *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross and Blue Shield of Connecticut, Inc.,* 518 F.Supp. 1100, 1106 (D. Conn. 1981), *aff'd* 675 F.2d 502 (2nd Cir. 1982).

Thus, insofar as Plaintiffs' claim is based on the theory that Blue Cross is a horizontal competitor engaged in price-fixing evidenced by the participating pharmacy agreements, Plaintiffs are not entitled to relief as a matter of law.

B.

To prevail on its theory of a simultaneous horizontal and vertical price-fixing, Plaintiff must establish the existence of concerted action among competing pharmacies in which the pharmacy agreements were used to implement a

price-fixing scheme. *See, Amicus* Brief of United States at 11, 13 n.6 (attached as Appendix "A" to Defendant's Brief in Support of Motion for Summary Judgment, filed March 30, 1983); *Medical Arts, supra,* 675 F.2d at 506 n.4. Blue Cross, the purchaser, may be a part of such a conspiracy, desite its vertical relationship with the pharmacies, if it acts in furtherance of the competitive restraints. *Id.* at 236; see also, *Sports Center, supra,* 673 F.2d at 791, n.4. The first element in such a claim is the existence of a horizontal combination among the competing pharmacies.

Defendants have submitted competent summary judgment affidavits denying the existence of such a conspiracy and asserting that decisions to enter into the pharmacy agreements were reached pursuant to the independent exercise of sound business judgment. The deposition testimony cited by Plaintiffs indicates that the Defendant pharmacies were motivated by factors other than profit margins, including a desire to increase sales volume and customer convenience, and the expectation that prescription drug customers would purchase other merchandise while in the pharmacy.[2] Response at 31-33. To avoid summary judgment Plaintiffs must produce evidence from which a jury could reasonably conclude that it is more likely that each pharmacy acted in combination with other pharmacies than that it acted independently. *Paul Kadair, Inc. v. Sony Corp.,* 694 F.2d 1017, 1027 n.27 (5th Cir. 1983).

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2. The depositions cited by Plaintiffs are not in evidence. However, Plaintiffs' summaries will be accepted as true because they are statements against the Plaintiffs' interest and their accuracy has not been contested by Defendants.

Plaintiffs' theory is that the pharmacy agreements are express agreements that establish the requisite joint action. These agreements are between individual pharmacies and Blue Cross. They are not express agreements among all or any of the allegedly conspiring participating pharmacies. They are therefore not direct evidence of a horizontal agreement.

Proof of concerted action may be made without evidence of an express agreement through the theory of conscious parallelism. Under this theory, the Plaintiff must show parallel business conduct among the Defendants and a "plus factor" from which it is reasonable to infer that the parallel conduct was more likely the result of concerted actions than of independent judgment. *Id.* Evidence of consciously parallel conduct alone is not enough. *Id.*

Concerted action is highly unlikely in this case because neither Blue Cross nor the pharmacies have a motive to conspire. Any effort by Defendant pharmacies to fix prices or to eliminate or reduce competition among pharmacies from whom Blue Cross might purchase prescriptions is contrary to Blue Cross' best interests. *Amicus* Brief, *supra* at 13, n.6.

Concerted action is also unlikely among the competing pharmacies. Once an individual pharmacy signs the agreement, it has a share of the Blue Cross market, regardless of whether or not other pharmacies sign. Concerted action is not necessary for each pharmacy to obtain the benefits expected from the agreements.[3] A conspiracy to get other

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3. Thus, this case is different from cases such as *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948) and

(Continued on next page)

pharmacies to sign would be a conspiracy to increase competition, not to eliminate or reduce it.

In the face of these strong contra-indications of concerted action, Plaintiffs present two factual bases for inferring concerted action. First, Plaintiff relies on the undisputed fact that each pharmacy knew that Blue Cross was offering the identical participating pharmacy agreement to every other pharmacy in Texas. As noted, consciously parallel behavior is not an adequate basis from which to infer a conspiracy without a "plus factor". In the absence of a need for concerted action, each Defendant's knowledge that Blue Cross was offering identical terms does not provide a circumstantial basis for inferring concerted action.

The second basis for inferring concerted action is that Defendants were acting contrary to their best business interests because inflationary increases in the overall cost of living were far greater than the increases allowed by Blue Cross in the two dollar dispensing fee.[4] From this

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(Continued from previous page)

Interstate Circuit v. United States, 306 U.S. 208, 226 (1939), in which each competitor knew that concerted action was essential to the successful operation of the plans at issue. In *Interstate*, for example, it was only with the knowledge that every one of his competitors was insisting on the same unfavorable restrictions on second run movies that any single distributor could impose terms without losing business. Smiliarly, in *Gypsum*, no single competitor could safely agree to charge a fixed price unless he was certain that every one of his competitors was charging the same price.

4. The history of increases in the dispensing fee is set out in the McDonald affidavit at ¶ 26. Plaintiff has not introduced competent summary judgment materials on cost of living increases. The Court will, however, take judicial notice of the fact that inflation has exceeded fifty percent since 1969. *See*, Response at 10. Plaintiffs also rely upon ¶ 4 of the Rubin affidavit, attached as Exhibit M to their brief in response to the summary judgment motion.

Plaintiffs conclude that Defendants were making little or no profit from participating in the insurance program. This is not responsive to Defendants' showing of good faith, independent business judgment motivated by a desire to increase prescription drug sale and sales of other merchandise.

In light of the absence of an apparent motive for a conspiracy, the uncontroverted evidence of good faith business judgments, and the general paucity of other evidence, the Rubin affidavit and general cost of living statistics are too slender a reed upon which to reasonably base an inference of conspiracy. *Pan-Islamic Trade Corp. v. Exxon Corp.,* 632 F.2d 539, 558 (5th Cir. 1980). Plaintiffs have failed to demonstrate *substantial* factual evidence tending to show the existence of a conspiracy. *Id.*

C.

An alternative ground for granting summary judgment for Defendants is that this is a rule of reason case and Plaintiffs' pleadings fail to show anticompetive impact, which is an element of a rule of reason case. *Northwest Power Products, Inc. v. Omark Industries,* 576 F.2d 83, 90 (5th Cir. 1978). The rule of reason is the proper standard to apply in this case because the alleged "price-fixing" at issue here is easily distinguished from the price-fixing that has so pernicious an effect on competition that it is deemed a *per se* violation. The price-fixing treated as a *per se* violation typically involves an agreement between competitors or between suppliers and distributors to fix the price charged to third parties. *Medical Arts, supra,* 518 F.Supp. at 1107; *Sausalito, supra,* 544 F.Supp. at 234.

In contrast, the price-fixing at issue here involves a seller and a buyer agreeing on a price between themselves.

It is indistinguishable from the price-fixing that accompanies every contract. *Broadcast Music, Inc. v. Columbia Broadcasting,* 441 U.S. 1, 9 (1979). An arrangement is not a *per se* Sherman Act violation simply because it has some impact on price. *Id.* at 23. Because the Court is in substantial agreement with the analysis in *Medical Arts,* and *Sausalito,* it will hold Plaintiffs to the requirements of a rule of reason case.[5] *See also, Quality Auto Body, Inc. v. Allstate Insurance Co.,* 660 F.2d 1195, 1203 (7th Cir. 1981) (cases cited therein).

Plaintiffs have plainly chosen not to pursue a rule of reason case. As in *Medical Arts,* they "have placed all their eggs in the per se basket.". *Medical Arts, supra,* 518 F.Supp. at 1109. They have consistently and emphatically characterized this case as *per se* price-fixing and therefore not pled anticompetitive effect on competition. Response at 13, 14, 37. Nor have Plaintiffs adequately responded to Defendants' summary judgment motion claiming independent business conduct, which lacks anticompetitive implications. Summary judgment for the Defendants is appropriate. *See, Medical Arts, supra,* 544 F.Supp. at 1109.

D.

The vertical element of Plaintiffs' simultaneously horizontal and vertical conspiracy is based on the theory

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5. Nothing in the recent case of *Arizona v. Maricopa County Medical Society,* — U.S. —, 102 S.Ct. 2466 (1982) suggests that this is improper. That case involved application of a *per se* analysis to a classic price-fixing scheme among competing doctors who were setting prices to be charged to third parties. Further, there is dicta in *Maricopa* that strongly suggests that a maximum fee schedule established by an insurer does not violate the antitrust laws. *Id.* at 2478, n.28.

that the pharmacy agreements are vertical price-fixing subject to a *per se* analysis. As with the alleged horizontal restraints, the price-fixing between the two parties to a contract is sufficiently different from *per se* vertical price-fixing schemes such as resale price maintenance that the rule of reason is the proper standard to apply. Plaintiffs have again "put all their eggs in the *per se* basket" and failed to plead or develop any factual issues on the competitive impact of the vertical arrangement.

An alternative ground for ordering summary judgment on the vertical elements of Plaintiffs' claim is that, as a matter of law, the pharmacy agreements survive a rule of reason analysis. The vertical agreements involve nothing more than an agreement between purchaser and seller. They do not fix prices or contain restrictions on either party other than those directly involved in the sale of prescription drugs for which Blue Cross must pay. In the absence of restraints unrelated to the transaction at issue, the agreements involve nothing more than the parties exercising their right to select the parties with whom and the terms on which they will do business. *See, Sausalito, supra,* 544 F.Supp. at 235.

E.

Plaintiffs allege a secondary boycott[6] arising from reimbursement procedures that provide Blue Cross' insureds with an economic incentive to fill their prescriptions

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6. The complaint claims a cause of action for a group boycott. Plaintiffs do not, however, allege that Defendants themselves have refused to deal with them. Instead, they claim that Defendants have encouraged and threatened others to refuse to deal. This is more accurately described as a secondary boycott.

at participating pharmacies. *See, Royal Drug, supra,* 440 U.S. at 209 n.3; Response at 16, 19. A secondary boycott, in which boycotters enlist the boycott target's potential customers to withhold patronage, violates Section 1 of the Sherman Act. *Duplex Printing Press Co. v. Deering,* 254 U.S. 443 (1921).

Defendants are entitled to summary judgment on the boycott claim because there is no factual dispute over whether efforts were made to restrain patronage of non-participating pharmacies. Blue Cross, as previously noted, is the patron; it stands in the shoes of each of its insureds. It is undisputed that Blue Cross did not refuse to deal with any licensed pharmacy in Texas. McDonald Affidavit, *supra,* at ¶ 14.

What Plaintiffs are challenging are the terms on which Blue Cross offered to deal. As an independent buyer, Blue Cross may insist on whatever terms it wants, insofar as they are directly related to the subject of the contract. There are limitations on Blue Cross' right to insist on terms, but none of these apply. There is no allegation that Blue Cross abused monopsony power. Nor do the terms of the contracts restrain participating pharmacies in regard to goods other than prescription drugs. *See, Sausalito, supra,* 544 F.Supp. at 235.

There is no evidence that Blue Cross conspired with other insurance companies to encourage them to refuse to deal with any pharmacy, or in any way limited the ability of non-participating pharmacies to do business with other insurance companies. *Cf., St. Paul Fire & Marine Insurance Co. v. Barry,* 438 U.S. 531, 541-45 (1977). Nor is there any evidence that Blue Cross conspired with some pharmacies in developing the terms of the insurance program

or pharmacy agreements for the purpose of excluding other pharmacies from competition. To the contrary, the undisputed evidence establishes that Blue Cross developed the prepaid prescription drug program without consulting with the Defendant pharmacies, then offered participation in the program to every licensed pharmacy in Texas on a "take-it-or-leave-it" basis. McDonald Affidavit, *supra*, ¶ 18.

Under these circumstances, the Defendants' conduct is not an unlawful boycott, even if the individual insureds are deemed to be purchasers. *See, Quality Auto Body, supra,* 660 F.2d at 1206; *Glen Eden Hospital v. Blue Cross & Blue Shield,* 55 F.Supp. 337, 344 (E.D. Mich. 1983).

F.

Accordingly, it is ORDERED that summary judgment be, and hereby is GRANTED in favor of Defendants on all claims alleging violations of the Sherman Act. All pendent claims are hereby DISMISSED without prejudice. All counter-claims are DISMISSED pursuant to the *Noerr-Pennington* doctrine. All cross-claims are DISMISSED as moot.

Signed this 7th day of July, 1983.

FRED SHANNON,
United States District Judge

ROYAL DRUG COMPANY, INC., etc., et al.,
Plaintiffs-Appellants,
v.
GROUP LIFE AND HEALTH INSURANCE CO., etc., et al.,
Defendants-Appellees.

GROUP LIFE AND HEALTH INSURANCE CO., etc., et al.,
Plaintiffs-Appellees,
v.
ROYAL DRUG COMPANY, INC., etc., et al.,
Defendants-Appellants.

No. 83-1544.

United States Court of Appeals,
Fifth Circuit.

Aug. 6, 1984.

Independent pharmacists brought antitrust action against Texas insurance company and three pharmacies, alleging that defendants violated Sherman Act by entering agreements to fix retail prices of drugs and pharmaceuticals and that their activities constituted an unlawful group boycott. The United States District Court for the Western District of Texas, 415 F.Supp. 343, John H. Wood, Jr., J., entered judgment for defendants and plaintiff pharmacies appealed. The Court of Appeals, 556 F.2d 1375, reversed, and defendants petitioned for certiorari which was granted. The United States Supreme Court, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261, affirmed the Court of Appeals. After trial on the merits, the District Court, Fred Shannon, J., granted summary judgment for

defendants and plaintiff pharmacies again appealed. The Court of Appeals, Clark, Chief Judge, held that agreements between group insurer providing prescription drug coverage and participating pharmacies limiting mark-up of such pharmacies to $2 deductible under each policy and providing for direct reimbursement of total cost less deductible, as opposed to insurer's reimbursement of insureds of only 75 percent when dealing with nonparticipating pharmacies did not constitute per se illegal horizontal or vertical price fixing, or an illegal boycott.

Affirmed.

1. Monopolies—12(1.10)

Activity that is not "manifestly anticompetitive" is analyzed under rule of reason, which inquires into unreasonableness of the restraint on competition, looking to all circumstances of the case, including facts peculiar to the business and history of, reasons for, and market impact of restraint. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. Monopolies—18

Agreements between group insurer providing prescription drug coverage and participating pharmacies limiting markup of such pharmacies to $2 deductible under each policy and providing for direct reimbursement of total costs less deductible, as opposed to insurer's reimbursement of its insureds of only 75 percent when dealing with nonparticipating pharmacies did not constitute a per se illegal horizontal combination because agreements did not run between competitors in pharmaceutical industry, nor between competitors in insurance industry, but between individual pharmacies and group insurer, which did

not compete with pharmacies, and group insurer did not seek support or advice of competing pharmacies in establishing fixed fees. Sherman Anti-Trust Act, § 1, 15 U.S. C.A. § 1.

3. Federal Civil Procedure—2484

In order to avoid summary judgment under theory of "conscious parallelism," plaintiff in antitrust action cannot rely on proof of parallel behavior alone; significant probative evidence of conscious parallelism is required, with some "plus" factor which tends to indicate that asserted unilateral behavior was not such in fact.

4. Monopolies—18

Agreements between group insurer providing prescription drug coverage and participating pharmacies limiting markup of such pharmacies to $2 deductible under each policy and providing for direct reimbursement of total cost less deductible, as opposed to insurer's reimbursement of its insureds of only 75 percent when dealing with nonparticipating pharmacies, did not constitute illegal vertical price fixing, since, absent evidence of presence and abuse of monopoly power, group insurer had clear right to bargain for lowest price and best deal for itself and its insureds. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

5. Federal Civil Procedure—2544

Assuming that antitrust complaint against group insurer alleging that insurer violated Sherman Act by entering agreements to fix retail prices of drugs and pharmaceuticals stated a claim under rule of reason, summary

judgment against plaintiffs was appropriate, since they offered only conclusory assertion that alleged price fixing eliminated competition. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

6. Monopolies—12(1.3)

Absent evidence of abuse of monopoly power, competitive bargaining is not a per se illegal activity. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Monopolies—18

Agreements between group insurer providing prescription drug coverage and participating pharmacies limiting markup of such pharmacies to $2 deductible under each policy and providing for direct reimburesement of total costs less deductible, as opposed to insurer's reimbursement of its insureds of only 75 percent when dealing with nonparticipating pharmacies, did not constitute an illegal boycott, where insurer gave every pharmacy same option to participate in sales of prescriptions to its insureds, there was no evidence that insurer conspired with other insurance companies, and insurer did not attempt to limit ability of nonparticipating pharmacies to deal with other insurance companies or general prescription-buying public. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

Appeal from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, JOLLY and DAVIS, Circuit Judges.

CLARK, Chief Judge:

Plaintiff pharmacies challenge a prepaid prescription drug insurance program as illegal conduct under section 1 of the Sherman Act. We affirm the district court's grant of summary judgment for defendants.

I

A group of independent pharmacists in San Antonio, Texas, brought this antitrust action in 1975 against Group Life and Health Insurance Co., known as Blue Shield of Texas (Blue Shield), and three other pharmacies. The complaint alleged that Blue Shield's prepaid prescription drug program violated section 1 of the Sherman Act, 15 U.S.C. § 1, as illegal price fixing, or alternatively as an illegal secondary group boycott of pharmacies that do not participate in the program. Originally, the district court granted summary judgment for defendants, holding the challenged agreements to be exempt from the antitrust laws under the McCarran-Ferguson Act, 15 U.S.C. § 1012 (b), because they constituted the "business of insurance." This court reversed, holding that the challenged agreements were not a part of the business of insurance. *Royal Drug Co. v. Group Life & Health Ins. Co.*, 556 F.2d 1375 (5th Cir. 1977). The Supreme Court affirmed this court's decision. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979).

On remand, the district court granted summary judgment for defendants on the merits, holding that the challenged prepaid drug insurance plans do not violate federal antitrust laws. We affirm.

II

The Supreme Court described the challenged prepaid drug insurance arrangement thus:

> Blue Shield offers insurance policies which entitle the policyholders to obtain prescription drugs. If the pharmacy selected by the insured has entered into a "Pharmacy Agreement" with Blue Shield, and is therefore a participating pharmacy, the insured is required to pay only $2 for every prescription drug. The remainder of the cost is paid directly by Blue Shield to the participating pharmacy. If on the other hand, the insured selected a pharmacy which has not entered into a Pharmacy Agreement, and is therefore a non-participating pharmacy, he is required to pay the full price charged by the pharmacy. The insured may then obtain reimbursement from Blue Shield for 75% of the difference between that price and $2.
>
> Blue Shield offered to enter into a Pharmacy Agreement with each licensed pharmacy in Texas. Under the Agreement, a participating pharmacy agrees to furnish prescription drugs to Blue Shield's policyholders at $2 for each prescription, and Blue Shield agrees to reimburse the pharmacy for the pharmacy's cost of acquiring the amount of the drug prescribed. Thus, only pharmacies that can afford to distribute prescription drugs for less than this $2 markup can profitably participate in the plan.

99 S.Ct. at 1072 (footnote omitted).

The original $2 dispensing fee was increased to $2.20 in 1976, and to $3.00 in 1981. There is no allegation or evidence in the record that Blue Shield consulted with phar-

macies in setting these fees. The plaintiffs note that this program has achieved great popularity among Blue Shield's insureds. The record does not indicate what portion of total drug sales are made under these arrangements.

III

The plaintiffs, nine of which participate in Blue Shield pharmacy agreements, argue that these agreements constitute *per se* illegal activity under the Sherman Act as simultaneously horizontal and vertical price-fixing arrangements.

Several federal courts have previously considered the legality of pharmacy agreements virtually identical to those at issue here. *See Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 675 F.2d 502 (2d Cir. 1982), *aff'g* 518 F.Supp. 1100 (D. Conn. 1981); *Sausalito Pharmacy, Inc. v. Blue Shield of California*, 677 F.2d 47 (9th Cir.), *cert. denied*, 456 U.S. 1016, 103 S.Ct. 376, 74 L.Ed.2d 510 (1982), *aff'g on basis of opinion below*, 544 F.Supp. 230 (N.D.Cal. 1981); *Feldman v. Health Care Service Corp.*, 562 F.Supp. 941 (N.D. Ill. 1982). These courts have uniformly upheld these agreements as nonviolative of antitrust laws.[1] We briefly sum-

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1. A state court has held a prescription drug insurance program to be *per se* violative of federal and state antitrust laws. *See Blue Cross of Virginia v. Commonwealth of Virginia*, 211 Va. 180, 176 S.E.2d 439 (1970). The Achilles' heel of that program, which distinguishes it from our case and the other federal cases cited, was the state pharmaceutical association's participation in setting fees. *See id.* at 440-41, 443, 444.

marize fundamental legal principles discussed at greater length in those cases before addressing the specific contentions by which the plaintiffs seek to put those cases in error.

[1] Section 1 of the Sherman Act outlaws "[e]very contract, combination . . ., or conspiracy, in restraint of trade among the several States . . . ." Courts have declared certain agreements or practices *per se* illegal "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. . . ." *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 1557, 60 L.Ed.2d 1 (1979) (activity is *per se* illegal under antitrust laws if "plainly anticompetitive and very likely to be without redeeming virtue"). Activity that is not "manifestly anticompetitive" is analyzed under the rule of reason, which inquires into the unreasonableness of the restraint on competition, looking to "all of the circumstances of the case, including the facts peculiar to the business and the history of, reasons for, and market impact of the restraint . . . ." *Medical Arts Pharmacy v. Blue Cross & Blue Shield of Connecticut, Inc.*, 675 F.2d at 504.

Price-fixing agreements have been held to be *per se* illegal. *See, e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 2472-75, 73 L.Ed.2d 48 (1982). We find, however, that the conduct challenged

here falls outside those categories of activity classified as *per se* illegal price fixing.

A

[2] The pharmacy agreements do not constitute a *per se* illegal horizontal combination such as that involved in *United States v. Masonite Corp.*, 316 U.S. 265, 62 S.Ct. 1070, 86 L.Ed. 1461 (1942), because the agreements do not run between competitors in the pharmaceutical industry, nor between competitors in the insurance industry, but between individual pharmacies and Blue Shield, which does not compete with pharmacies. Nor is there any allegation that Blue Shield has sought the support or advice of the competing pharmacies in establishing the fixed fees. Hence this case is outside the ambit of *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (medical fee schedules established by foundation composed of medical practitioners constituted *per se* illegal price fixing), and *Blue Cross v. Virginia*, 211 Va. 180, 176 S.E.2d 439 (1970) (Blue Cross pharmaceutical plan that received support of state pharmaceutical society with respect to establishment of fees constituted *per se* illegal price fixing under federal and state antitrust laws). Rather, as *Medical Arts* noted, these pharmacy agreements are "novel restraints with potential procompetitive effects," 675 F.2d at 505. They fall outside established *per se* categories of illegal activities.

[3] The plaintiffs argue that even though Blue Shield does not compete with pharmacies, the uniform contracts entered into separately between competing sellers and a "powerful buyer" nevertheless constitute an illegal

horizontal combination. This argument seems to assert the theory of "conscious parallelism," under which a combination among drugstore competitors might be established by circumstantial evidence of parallel conduct among the competitors. "[T]wo elements must be established by a plaintiff relying on a theory of conscious parallelism: (1) that the defendants engaged in consciously parallel action, (2) which was contrary to their economic self-interest so as not to amount to a good faith business judgment." *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir.1980). In order to avoid summary judgment under this theory, the plaintiff cannot rely on proof of parallel behavior alone; significant probative evidence of conscious parallelism is required, "with . . . some 'plus' factor which tends to indicate that the asserted unilateral behavior was not such in fact . . . ." *Paul Kadair, Inc. v. Sony Corp. of America,* 694 F.2d 1017, 1027 n. 27 (5th Cir.1983). The plaintiffs have failed to come forward with any significant probative evidence that would establish a fact issue as to whether the participating pharmacies did not act according to independent exercises of their respective business judgments to increase drug sales and customer traffic.

Apparently recognizing their failure to satisfy these criteria for "conscious parallelism," the plaintiffs insist that they do not intend to assert a classic conscious parallelism case and don't need to because the evidence of the actual pharmacy agreements negates any need to establish a combination by means of circumstantial evidence. This distinction fails to further plaintiffs' position, for the pharmacy agreements do not run between competitors and hence do not in and of themselves establish a horizontal

combination. Such a combination must be established if this sort of attack is to succeed.

In support of their horizontal price fixing theory, the plaintiffs rely on *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939). In *Interstate Circuit,* a group of motion picture exhibitors demanded, as a condition of their continued exhibition of distributors' films, that the distributors impose minimum price and other restrictions in selling their products for subsequent runs. The distributors' adherence to and participation in the scheme was held to be an unlawful conspiracy under the Sherman Act.

Although *Interstate Circuit* bears a superficial resemblance to the instant case, in that it involves separate contracts between competing sellers and a group of buyers acting as a unit, the Supreme Court's analysis was predicated upon the rule of reason, analyzing the unreasonableness of the restraint in terms of the demonstrated effects on competition and oppressive price maintenance, and not upon the *per se* rule. Our analysis in part IV demonstrates that summary judgment in this case was equally proper under the rule of reason.

B

[4] The plaintiffs assert that the pharmacy agreements are *per se* illegal vertical price fixing. The plaintiffs cite no case, however, to suggest that an insurance company, by engaging in procompetitive conduct in the insurance business, can become a price-fixer in the retail drug business because its method of competition seeks to bring its customers the maximum insurance reimbursement. To

support a claim of conspiracy to maintain resale prices, there must be evidence that tends to exclude the possibility that Blue Shield and the pharmacies were acting independently. *See Monsanto Co. v. Spray-Rite Service Corp.*, — U.S. —, 104 S.Ct. 1464, 1471, 79 L.Ed.2d 775 (1984). The opposing effects of Blue Shield's intermediate interest in minimizing drug-sale reimbursements and of the pharmacies' ultimate interest in earning top dollar tend to indicate that these respective parties were acting independently and without a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.*, *quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980).

Moreover, the use of resale price maintenance theory in this instance is unwieldly. Not only are the prices being proposed to sellers rather than by sellers, but also there is no resale transaction in which the price is sought to be maintained. *Accord Medical Arts*, 518 F.Supp. at 1106-07.

The Supreme Court characterized these pharmacy agreements as "merely arrangements for the purchase of goods and services by Blue Shield." *Group Life & Health Ins. v. Royal Drug Co.*, 99 S.Ct. at 1075. Plaintiffs argue that this language was dicta and that the district court and other courts have erred in relying on it to characterize Blue Shield's role in these transactions as that of a "purchaser." Plaintiffs urge in their briefs that whether Blue Shield occupied the status of a "purchaser" of drugs by virtue of the pharmacy agreements is a material issue of fact. At oral argument, however, plaintiffs' counsel conceded that it is immaterial to this case whether Blue Shield is considered a purchaser or an indemnitor. We agree with this latter assertion. *Accord Medial Arts*, 675 F.2d at 505-06.

In either event, Blue Shield and the pharmacies sit on opposite sides of the bargaining table. Absent any evidence of the presence and abuse of monopoly power, Blue Shield has the clear right to bargain for the lowest price and best deal for itself and its customers/insureds.

IV

The plaintiffs have pled and tried this case as a *per se* case. They have not pled any anticompetitive effect. Assuming without deciding, however, that the complaint can be read to state a claim under the rule of reason,[2] we conclude that summary judgment on a rule of reason claim was equally appropriate. We recently articulated the applicable standard of review in *Walker v. U-Haul Co. of Mississippi*, 734 F.2d 1068, 1070-71 (5th Cir. 1984) (footnotes omitted):

> Summary judgment is generally disfavored in antitrust cases, which often hinge on issues of motive, intent, and credibility. Nevertheless, we have recognized that a plaintiff may not immunize himself against the entry of summary judgment simply by alleging a violation of the antitrust laws. As in other types of cases, if the pleadings and accompanying evidentiary materials, when viewed in the light most favorable to the non-moving party, raise no "genuine issue as to any material fact," and it appears that the

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2. *But see Kinnear-Weed Corp. v. Humble Oil & Refining Corp.*, 214 F.2d 891, 894 (5th Cir. 1954) ("It is essential that the complaint allege facts from which it can be determined that the conduct charged to be in violation of the antitrust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce").

moving party is entitled to judgment as a matter of law, the court may properly enter judgment. Moreover, the party opposing summary judgment may not rely merely on the pleadings or even on conflicting testimony, but must introduce "significant evidence demonstrating the existence of a genuine fact issue."

[5] In support of a rule of reason claim, plaintiffs offer only a conclusory assertion that the alleged price fixing "eliminates competition." Plaintiffs contend that the defendants have conspired to drive out of business those smaller service-oriented pharmacies that cannot compete for Blue Shield insureds' business without participating in the agreements, yet cannot afford to offer full services under the fees fixed. Even if the complaint be broadly construed to allege predatory pricing or monopoly pricing by an insurer with dominant power in the drug-purchasing market, the plaintiffs' case nevertheless fails under the rule of reason, for they have presented no evidence that goes beyond "unsupported conjecture" as to either of these theories, and hence cannot forestall summary judgment. *See id.* at 1072. Moreover, as the district court noted, it is illogical to suppose either that Blue Shield would conspire to reduce competition among pharmacies with which it must deal, or that pharmacies would seek to heighten competition with each other by conspiring to sign the agreements, when each individual pharmacy could readily obtain the full benefits of a pharmacy agreement without concerted action.

V

As an alternative *per se* theory, plaintiffs contend that defendants have conspired to cause Blue Shield's in-

sureds to boycott nonparticipating pharmacies. Insureds are reimbursed for only 75 percent of their drug purchases at nonparticipating pharmacies, versus one hundred percent at participating pharmacies. Furthermore, insureds who make purchases from nonparticipating pharmacies must indvidually submit insurance forms to get reimbursed, a burden avoided by shopping at a participating pharmacy. These arrangements, plaintiffs argue, coerce insureds to deal only with participating pharmacies and effect a secondary boycott. We disagree.

[6] It is uncontested that Blue Shield derives a fiscal advantage in offering greater benefits to insureds who deal with participating pharmacies. When the insured deals with a nonparticipating pharmacy, Blue Shield must process each insured's reimbursement claim individually. But when insureds deal with a participating pharmacy, the pharmacy agrees to accumulate its charges and submit an aggregate periodic claim for reimbursement of many insureds' prescriptions. Thus, Blue Shield can process the payment for many prescriptions at once. Absent evidence of abuse of monopoly power, competitive bargaining is not *per se* illegal activity. Nor does it become illegal because the bargaining inures to the advantage of Blue Shields' insureds.

[7] It is undisputed that Blue Shield has given every pharmacy in Texas the same option to participate in sales of prescriptions to its insureds. There is no evidence that Blue Shield has conspired with other insurance companies. Blue Shield has not attempted to limit the ability of nonparticipating pharmacies to deal with other insurance companies or the general prescription-buying public. It is the

competitive, not the exclusionary, effect of its actions that evokes plaintiffs' claim. In these circumstances, defendants' conduct does not constitute an illegal boycott. *Accord Quality Auto Body, Inc., v. Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020, 102 S.Ct. 1717, 72 L.Ed.2d 138 (1982); *Glen Eden Hospital, Inc. v. Blue Cross & Blue Shield of Michigan, Inc.*, 555 F.Supp. 337, 344 (E.D.Mich. 1983).

For these reasons, the district court's judgment is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1544

D. C. DOCKET NO. SA-75-CA-131 c/w SA-79-CA-488

ROYAL DRUG COMPANY, INC., etc., et al.,

Plaintiffs-Appellants,

vs.

GROUP LIFE AND HEALTH INSURANCE CO., etc., et al.,

Defendant-Appellees.

GROUP LIFE AND HEALTH INSURANCE CO., etc., et al.,

Plaintiffs-Appellees,

vs.

ROYAL DRUG COMPANY, INC., etc., et al.,

Defendant-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before CLARK, Chief Judge, JOLLY and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiffs-appellants and defendants-appellants pay to defendants-appellees and plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court

August 6, 1984

ISSUED AS MANDATE:

OP-JDT-10

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1544

ROYAL DRUG COMPANY, INC., ETC., ET AL.,

Plaintiffs-Appellants,

vs.

GROUP LIFE AND HEALTH INSURANCE CO., ETC., ET AL.,

Defendants-Appellees.

GROUP LIFE AND HEALTH INSURANCE CO., ETC., ET AL.,

Plaintiffs-Appellees,

vs.

ROYAL DRUG COMPANY, INC., ETC., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING

(Filed September 26, 1984)

Before CLARK, Chief Judge, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ Charles Clark
Chief Judge

REHG-4

No. 84-804

FILED
DEC 12 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROYAL DRUG COMPANY, INC. d/b/a
ROYAL PHARMACY OF CASTLE HILLS and
DISCO PRESCRIPTION PHARMACY, *et al.*,
Petitioners,

v.

GROUP LIFE AND HEALTH INSURANCE COMPANY a/k/a
BLUE SHIELD and/or BLUE CROSS-BLUE SHIELD
OF TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Court of Appeals and the District Court correctly held that no significant probative evidence supported a finding that Respondents participated in a horizontal combination to restrain trade?

II. Whether the Court of Appeals and the District Court correctly held that the Pharmacy Agreements do not amount to *per se* unreasonable vertical restraints of trade?

III. Whether the Court of Appeals and the District Court correctly held that Petitioners failed to raise an issue under the rule of reason?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-804

ROYAL DRUG COMPANY, INC. d/b/a
ROYAL PHARMACY OF CASTLE HILLS and
DISCO PRESCRIPTION PHARMACY, *et al.*,
Petitioners,

v.

GROUP LIFE AND HEALTH INSURANCE COMPANY a/k/a
BLUE SHIELD and/or BLUE CROSS-BLUE SHIELD
OF TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

Respondents, Group Life and Health Insurance Company, also known as Blue Shield of Texas ("Blue Shield"), Walgreen Texas Co. ("Walgreen") and The Sommers Drug Stores Company ("Sommers"),[1] respectfully request the Court to deny the Petition For a Writ of Certiorari to review the Judgment entered in this case by

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, we note that Blue Shield is a wholly-owned subsidiary of Group Hospital Service, Inc., also known as Blue Cross of Texas. Walgreen Texas Co., formerly a wholly-owned subsidiary of Walgreen Co., was merged into Walgreen Co. in August, 1984. The Sommers Drug Stores Company is now known as Corrigan Enterprises, Inc.

the United States Court of Appeals for the Fifth Circuit on August 6, 1984.

STATEMENT OF THE CASE

A. Proceedings Below

This civil antitrust suit was filed in May, 1975, by eighteen pharmacy owners doing business in San Antonio, Texas, against Blue Shield, Walgreen and Sommers. Petitioners challenge under section 1 of the Sherman Act, 15 U.S.C. § 1, certain aspects of Blue Shield's prepaid prescription drug insurance program. Specifically, Petitioners attack the contracts between Blue Shield and individual pharmacies pursuant to which those pharmacies agree to provide prescription drugs to Blue Shield's insureds and are reimbursed therefor by Blue Shield.

In answer to the Complaint, Respondents originally set forth, *inter alia*, the affirmative defense that the prepaid prescription drug insurance plan constitutes the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, and thus is exempt from scrutiny under the federal antitrust laws.[2] Upon the conclusion of discovery directed to that affirmative defense, the parties agreed to submit the exemption issue for preliminary determination by the District Court. Thereafter, Respondents' motions to dismiss were granted. *Royal Drug Co. v. Group Life and Health Insurance Co.*, 415 F. Supp. 343 (W.D. Tex. 1976). The Court of Appeals reversed, holding that the McCarran-Ferguson exemption was inapplicable. *Royal*

[2] The procedural history and facts involved herein are set forth in the opinions of the Court of Appeals and the District Court, appended to the Petition For a Writ of Certiorari ("Petition"), as well as the opinion of this Court on the prior appeal of this case, No. 77-952, *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). References herein to the Petition appear as (Pet. at ——) and to the opinions below as (Pet. App. ——).

Drug Co. v. Group Life and Health Insurance Co., 556 F.2d 1375 (5th Cir. 1977). In a 5-4 decision, this Court affirmed that determination. *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). As this Court noted, the only issue presented in the prior appeal was the applicability of the McCarran-Ferguson exemption. This Court also observed that "[w]hether the Agreements are *illegal* under the antitrust laws is an entirely separate question, not now before us," and "[i]t is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal." 440 U.S. at 210 & n.5 (emphasis in original; footnote omitted).

On remand, and following the completion of discovery, Respondents moved for summary judgment on the substantive issue of antitrust liability. After briefing by the parties, as well as oral argument, the District Court entered a Memorandum Opinion and Order granting Respondents' motions (Pet. App. at 1). The District Court also dismissed Respondents' counterclaims.

Petitioners appealed from that portion of the Memorandum Opinion and Order wherein the District Court determined that the prepaid prescription drug insurance plan does not violate the federal antitrust laws. Respondents did not appeal the dismissal of their counterclaims. In an opinion dated August 6, 1984, the Court of Appeals affirmed the District Court's decision (Pet. App. at 12). Petitioners' petition for rehearing was denied on September 26, 1984 (Pet. App. at 28).

B. Statement of Facts

Blue Shield is an insurance company duly authorized by the Texas State Board of Insurance to transact the business of life, health and accident insurance within

the State of Texas.[3] Petitioners, like Walgreen, each own and operate pharmacies in San Antonio, Texas. Sommers formerly owned and operated pharmacies in San Antonio. Nine of the eighteen Petitioners, as well as Walgreen, participate in Blue Shield's prepaid prescription drug insurance program challenged herein.[4]

1. *The Prescription Drug Insurance Program*

Blue Shield, like numerous other insurance companies,[5] offers prepaid prescription drug insurance coverage. These policies protect against the risk of financial loss occasioned by the need to purchase drugs prescribed by a physician. Blue Shield's prepaid drug policies are issued as part of group health insurance plans whereby Blue Shield insures employee groups for comprehensive health care benefits and employers pay part or all of the policy premiums.[6]

The policies obligate Blue Shield to insure its policyholders against the cost of prescription drugs in one of

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[3] All of the stock of Blue Shield is owned by Group Hospital Service, Inc., a non-profit hospitalization insurer organized under Chapter 20 of the Texas Insurance Code, TEX. INS. CODE. ANN. Art. 20.01 *et seq.* Group Hospital Service, Inc. also is known as Blue Cross of Texas.

[4] Sommers likewise participated in the program.

[5] Similar programs are offered by Aetna Life Insurance Company, Metropolitan Life Insurance Company, the United States Government and others. *See Feldman v. Health Care Service Corp.*, 562 F. Supp. 941, 943 & n.2 (N.D. Ill. 1982); *Arkansas Pharmacists Association v. Harris*, 627 F.2d 867 (8th Cir. 1980).

[6] The prepaid drug insurance program had its origins in 1967, when the United Auto Workers and the three largest domestic automobile manufacturers entered into a collective bargaining agreement establishing a prepaid prescription drug program, to become effective October 1, 1969, for U.A.W. members. Michigan Blue Shield was the first insurer to offer the program, and Blue Shield of Texas subsequently agreed to provide prepaid drug coverage for employees of Ford Motor Company and Chrysler Corporation living in Texas.

two ways: Primarily by contractual arrangements with pharmacies who agree to provide prescription drugs to the insureds in exchange for reimbursement by Blue Shield; and secondarily by partial cash reimbursement directly to the policyholder for amounts expended in the purchase of drugs from pharmacies that do not have a contractual arrangement with Blue Shield. The Participating Drug Pharmacy Agreement ("Pharmacy Agreement"), which is a bilateral contract between Blue Shield and individual pharmacies, is the principal mechanism through which prescription drug benefits are provided to insureds in accordance with Blue Shield's obligations under the policies.

2. *Mechanics of the Program*

Blue Shield's insureds are entitled to obtain prescription drugs from any pharmacy they choose. If the insured selects a pharmacy that has entered into a Pharmacy Agreement with Blue Shield (a "Participating Pharmacy"), the policy provides that the insured is required to pay no more than a $2.00 deductible for each prescription. Under the Pharmacy Agreement, a pharmacy agrees to dispense drugs to Blue Shield's insureds and to collect the $2.00 deductible from the insured.[7] The Participating Pharmacy then agrees to look directly to Blue Shield for reimbursement, which is obtained by filing a claim. Blue Shield agrees to reimburse the Participating Pharmacy for the acquisition cost of each dispensed drug, plus a dispensing fee, minus the amount of the deductible.[8] If the insured elects to have his or her prescription filled by a pharmacy other than a Par-

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[7] The pharmacy may "discount the deductible," *i.e.*, accept less than $2.00 from the insured, if it so desires.

[8] When the prescription drug program was instituted by Blue Shield in 1969, the amount of the dispensing fee was $2.00. Thereafter, in December, 1976, the dispensing fee was increased to $2.20. In October, 1981, the dispensing fee again was increased to $3.00.

ticipating Pharmacy, the policy provides that Blue Shield will reimburse the insured for 75% of the "usual and customary" charge for the drug after first subtracting the $2.00 deductible.

3. *History of the Program*

After receiving authorizaiton from the Texas State Board of Insurance to offer the prepaid drug insurance policy, Blue Shield sent a standard form letter to all licensed pharmacies in the State of Texas offering each the opportunity to enter into a Pharmacy Agreement. There were no negotiations with or among any pharmacies. Thereafter, Blue Shield issued the prepaid drug insurance policy to various groups and, in order to be able to provide the policy benefits, entered into Pharmacy Agreements with individual pharmacies throughout Texas.

In 1974, Blue Shield decided to offer a comprehensive health care plan, including prepaid prescription drug coverage, to various groups in the San Antonio metropolitan area. Through another mass mailing, Blue Shield again offered the opportunity of entering into a Pharmacy Agreement to all licensed pharmacies in San Antonio.

It is undisputed that the opportunity of entering into a Pharmacy Agreement with Blue Shield is, and always has been, available to all licensed pharmacies in Texas. Indeed, as noted above, nine of the Petitioners operate Participating Pharmacies in the San Antonio area. The decision of whether or not to enter into a Pharmacy Agreement with Blue Shield lies solely with each individual pharmacy. It is uncontroverted that Blue Shield developed the Pharmacy Agreement without consulting any pharmacy, that the same terms are offered to all pharmacies and that Blue Shield did not negotiate the terms of the Pharmacy Agreement with any pharmacy, but rather offered the Agreement to each individual pharmacy in the State of Texas on a "take it or leave it"

basis. Petitioners adduced no evidence—nor have they alleged—that Blue Shield is controlled or influenced by any pharmacy, or that Blue Shield agreed with any pharmacy concerning the reimbursement rate Blue Shield would offer in the Pharmacy Agreement.

REASONS FOR DENYING THE PETITION

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari "will be granted only when there are special and important reasons therefor." In an effort to meet this requirement, Petitioners seek to characterize the Pharmacy Agreements as price fixing, and then argue that because decisions of this Court hold that price fixing is illegal *per se*, the decisions of the Court of Appeals and District Court are contrary to established Supreme Court precedent. Petitioners' "boycott" argument is similarly tautological. Because decisions of the federal courts uniformly and correctly hold that the Pharmacy Agreements do not fall within the sphere of *per se* illegality, and because Petitioners from the inception of this case have eschewed the opportunity to challenge the Pharmacy Agreements as unlawful under the rule of reason, the Petition should be denied.

I. THE COURTS BELOW PROPERLY HELD THAT THE PHARMACY AGREEMENTS ARE NOT ILLEGAL PER SE

Petitioners' principal argument is that the Pharmacy Agreements constitute *per se* illegal price fixing, because they establish the compensation that Participating Pharmacies will receive on sales of prescription pharmaceuticals to Blue Shield insureds. As this Court acknowledged in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), however, not every arrangement that affects price constitutes *per se* illegal price fixing, because all commercial contracts affect price in some way:

> [T]his is not a question simply of determining whether two or more [parties] have literally "fixed" a "price". . . . Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not per se in violation of the Sherman Act. Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "per se price fixing."

441 U.S. at 8-9 (citation omitted). Applying these principles, and recognizing this Court's determination in the prior appeal of this case that "[t]he Pharmacy Agreements . . . are merely arrangements for the purchase of goods and services by Blue Shield," 440 U.S. at 214, as well as upon the Justice Department's position that the plan does not violate the antitrust laws, 440 U.S. at 210 n.5, the Courts of Appeals in *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross and Blue Shield of Connecticut, Inc.*, 675 F.2d 502 (2d Cir. 1982), *aff'g*, 518 F. Supp. 1100 (D. Conn. 1981) ("*Medical Arts*"), and *Sausalito Pharmacy, Inc. v. Blue Shield of California*, 677 F.2d 47 (9th Cir.), *cert. denied*, 459 U.S. 1016 (1982), *aff'g*, 544 F. Supp. 230 (N.D. Cal. 1981) ("*Sausalito Pharmacy*"), rejected application of *per se* analysis, and affirmed summary judgments entered in favor of Blue Cross and Blue Shield Plans "virtually identical" to the insurance program presented herein. Summary judgment also was entered in favor of the plan in *Feldman v. Health Care Service Corp.*, 562 F. Supp. 941 (N.D. Ill. 1982) ("*Feldman*").[9]

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[9] Analogous programs providing insurance coverage other than for prescription drugs likewise have been held not to violate the Sherman Act. *Kartell v. Blue Shield of Massachusetts, Inc.*, No. 84-1241 (1st Cir., Nov. 28, 1984); *Pennsylvania Dental Association v. Medical Service Association of Pennsylvania*, 745 F.2d 248 (3d Cir. 1984); *Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982); *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir.

The Petition is barren of even a citation to the foregoing decisions upholding the prepaid prescription drug insurance plan. Moreover, Petitioners do not identify a single federal court decision even suggesting that the Pharmacy Agreements constitute a *per se* violation—whether "price fixing," "boycott" or otherwise—of the Sherman Act. As demonstrated below, Petitioners' failure to raise a conflict between the decisions below and a decision of this or another Court simply serves to betray the fact that Petitioners' attempted characterization of the Pharmacy Agreements as illegal *per se* is contrary to well-settled antitrust principles.

A. Price Fixing

Petitioners' first argument is that the prepaid prescription drug program constitutes *per se* illegal price fixing (Pet. at 13-22). Although Petitioners refrain from explicitly casting the Pharmacy Agreements either as horizontal or vertical price fixing, the decisions cited by Petitioners embrace both theories. As the federal courts—as well as the Justice Department—have uniformly determined, neither characterization is appropriate under the circumstances of this case.

1. *Horizontal Price Fixing*

A horizontal price fixing arrangement, of course, is one between direct competitors, whereas a vertical price

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1981), *cert. denied*, 455 U.S. 1020 (1982); *Davidowitz v. San Diego County Dental Society*, 1983-1 Trade Cas. ¶ 65,221 (S.D. Cal. 1983); *Michigan State Podiatry Association v. Blue Cross and Blue Shield of Michigan*, 1982-2 Trade Cas. ¶ 64,801 (E.D. Mich. 1982); *Blue Cross and Blue Shield of Michigan v. Michigan Association of Psychotherapy Clinics*, 1980-2 Trade Cas. ¶ 63,351 (E.D. Mich. 1980). *See also Arkansas Pharmacists Association v. Harris*, 627 F.2d 867 (8th Cir. 1980) (similar plan promulgated by Secretary of HEW in connection with Medicare program; summary judgment in favor of the government upheld).

fixing arrangement is one between firms at different levels in the chain of distribution, *e.g.*, between manufacturer and distributor, or between wholesaler and retailer. *See Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Recognizing that "not every agreement that has an impact on price, either vertically or horizontally, is a *per se* violation of the Sherman Act," and that "[t]he proper inquiry, thus, is not whether a particular agreement literally fixes a price, but whether the agreement is so 'plainly anticompetitive' and so very likely without 'redeeming virtue' that a court will apply the label '*per se* price fixing,'" *citing Broadcast Music*, 441 U.S. at 8-9, the Court in *Medical Arts* summarily rejected the attempt by the plaintiffs therein to bring the Pharmacy Agreements within the ambit of this Court's decisions condemning horizontal price fixing:

> Plaintiffs contend that the pharmacy agreements are a form of horizontal price-fixing and, hence, *per se* unlawful. This characterization completely ignores the relationship of the parties. Blue Cross is neither a seller in competition with retail pharmacies, nor a manufacturer or wholesaler in competition with suppliers of pharmaceuticals. Rather, as discussed at length in *Group Life & Health Insurance Co. v. Royal Drug Co., supra*, Blue Cross buys prescription drug products for their insureds. There has been no showing, indeed, no claim, that Blue Cross has conspired with other third-party payors who offer comparable prescription drug plans. Plaintiffs' suggestion that Blue Cross has somehow facilitated an unlawful horizontal conspiracy among participating pharmacies is similarly unpersuasive. The question, for purposes of a horizontal analysis, is whether Blue Cross has conspired with *its* competitors to restrain trade. The answer is that it clearly has not.

518 F. Supp. at 1106, *aff'd*, 675 F.2d at 505 (emphasis in original).[10]

In its *Amicus* Brief filed in this Court in the prior appeal of this case, the Justice Department further explained these principles:

> As a general matter, however, antitrust principles would not preclude the offering of prepaid health insurance programs that use insurer-provider agreements. For example, the pleadings in this case indicate that the Pharmacy Agreements are bilateral contracts for the purchase of goods and services by Blue Shield. Blue Shield has offered to purchase drugs and pharmacy services from any pharmacy that will accept acquisition cost plus [the dispensing fee]. *Unless respondents could establish that some conspiracy among pharmacies is at work the Pharmacy Agreements would not amount to "price fixing."* Transactions at a set price, through a series of voluntary bilateral contracts, are not price fixing even though large numbers of sellers of services may be involved.

Amicus Brief at 10-11 (citations omitted; emphasis added).

Petitioners' attempt to invoke the theory of "conscious parallelism" to establish concerted action between pharmacies likewise was properly rejected by the Courts below. As the Fifth Circuit explained in *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1027 n.27 (5th Cir. 1983):

> In order to avoid a motion for summary judgment, a claimant must come forward with significant probative evidence supporting its theory of conscious

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[10] The foregoing analysis fully applies to the present case. Blue Shield is neither a seller of prescription drugs, nor a manufacturer or wholesaler in competition with suppliers of pharmaceuticals. There has been no allegation that Blue Shield conspired with other insurers who offer comparable prescription drug programs.

> parallelism with, as it has often been stated, some "plus" factor which tends to indicate that the asserted unilateral behavior was not such in fact, *e.g.*, that the decisions not to deal were contrary to defendants' economic self-interest so as to raise an issue of good faith business judgment.

Citing Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).[11] *Accord, Pan Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981). Respondents submitted substantial summary judgment proof —which was uncontroverted by Petitioners—denying the existence of a conspiracy and asserting that the Pharmacy Agreements were entered into pursuant to the independent exercise of sound business judgment. Furthermore, as the Courts below recognized, Petitioners' theory of a conspiracy among pharmacies and Blue Shield is counter-intuitive, because neither Blue Shield nor the pharmacies have an incentive to conspire: Any effort by pharmacies to raise prices or reduce competition among pharmacies from whom Blue Shield might purchase would

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[11] For this reason, Petitioners' purported reliance on *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208 (1939); *U.S. v. Masonite Corp.*, 316 U.S. 265 (1942); and *U.S. v. United States Gypsum Co.*, 333 U.S. 364 (1948), is misplaced. Each of those cases involved interdependent action. For example, in *Interstate Circuit*

> [e]ach [competitor] was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits.

306 U.S. at 222. *Accord, Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1027 n.27 (5th Cir. 1983). Moreover, contrary to Petitioners' implicit suggestion (Pet. at 20), the defendant in *Masonite* was a competitor of the other members of the combination, thus presenting a classic horizontal price fixing conspiracy.

be resisted—not encouraged—by Blue Shield.[12] Similarly, the Courts below correctly noted that pharmacies would have no interest in conspiring among themselves to sign the Pharmacy Agreements, because such a conspiracy would result in *more* competition among pharmacies for the patronage of Blue Shield's insureds, thus reducing the market shares of all. In light of Respondents' uncontroverted affidavits and deposition testimony demonstrating independent business reasons for entering into the Pharmacy Agreements, and Petitioners' total failure to demonstrate that interdependent action among pharmacies was necessary for each to derive benefit from those Agreements, the Courts below properly rejected Petitioners' conscious parallelism theory.[13]

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[12] The Justice Department made this point in its *Amicus* Brief (*Amicus* Brief at 14 n.6).

[13] The Courts below likewise properly rejected Petitioners' argument that the Pharmacy Agreements are unlawful under *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Contrary to Petitioners' suggestion, this Court in *Maricopa* expressly noted that the arrangement challenged therein was "an agreement among competing physicians"—a classic horizontal restraint. 102 S. Ct. at 2469. Indeed, this Court expressly distinguished *Maricopa* from the arrangement challenged herein:

> Nor does this case present the question whether an insurer may, consistent with the Sherman Act, fix the fee schedule and enter into bilateral contracts with individual doctors. That question was not reached in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L. Ed. 2d 261 (1979). In an *amicus curiae* brief, the Department of Justice expressed its opinion that such an arrangement would be legal unless the plaintiffs could establish that a conspiracy among providers was at work. *Our point is simply that the record provides no factual basis for the respondents' claim that the doctors must fix the fee schedule.*

102 S. Ct. at 2478 n.26 (emphasis added; citations omitted).

2. *Resale Price Maintenance*

Petitioners argue alternatively that the Pharmacy Agreements constitute *per se* illegal vertical price fixing. As the Court in *Medical Arts* noted, this Court's decisions do not support such a characterization:

> This argument, though facially more plausible, is nonetheless unavailing. Even assuming *Albrecht* [*v. Herald Co.*, 390 U.S. 145 (1968)] and *Kiefer-Stewart* [*Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951)] can be read in the expansive manner suggested by plaintiffs, the pharmacy agreements differ in several important respects from the typical agreement between a manufacturer and a distributor establishing resale prices; most significantly, under the pharmacy agreements, there is no resale of anything. *Cf. Sausalito II* at [234] n.1. The only price that is established by the pharmacy agreement is the price that Blue Cross will pay participating pharmacies for prescribed drugs. "The price-fixing within the scope of the *per se* prohibition of § 1, however, is an agreement to fix the price to be charged in transactions with third parties, not between the contracting parties themselves."

518 F. Supp. at 1106-07, *aff'd*, 675 F.2d at 505-06, *quoting Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 446 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978) (footnote omitted). *Accord, Sausalito Pharmacy*, 544 F. Supp. at 234 n.1.

The foregoing logic, adopted by the Courts below, is irrefutable. Resale price maintenance is, by definition, a seller's control over the price at which its customer resells. Yet, Blue Shield sells nothing to pharmacies. Because the decisions below are fully in accord with this Court's pronouncements concerning resale price maintenance, Petitioners' invitation to expand the *per se* rule should be declined.

3. *Blue Shield's Status As A "Purchaser" Is Not An Issue*

Contrary to Petitioners' suggestion, Blue Shield's status as a purchaser is not an issue. Relying upon this Court's determination in the prior appeal of this case that the Pharmacy Agreements "are merely arrangements for the purchase of goods and services by Blue Shield," 440 U.S. at 214, the Courts in *Medical Arts* and *Sausalito Pharmacy* held that the Pharmacy Agreements are not *per se* illegal for the additional reason that they are agreements between purchaser and seller. 518 F. Supp. at 1109, *aff'd*, 675 F.2d at 505; 544 F. Supp. at 233, *aff'd*, 677 F.2d 47. More important, however, is the fact that whereas a determination that Blue Shield is the "purchaser" precludes application of the *per se* rule, it does not follow that the "price fixing" rubric attaches absent such a determination. Rather, as the Second Circuit in *Medical Arts* emphasized, *regardless* of whether Blue Shield is characterized as a "purchaser" or "indemnitor," this Court's decisions do not support application of the *per se* rule:

> Whether Blue Cross is characterized as a purchaser or simply as an indemnitor or third-party payor, it is the ultimate payor, and therefore its prescription drug plan differs significantly from the vertical arrangements to restrict resale prices that were invalidated in *Albrecht* and *Kiefer-Stewart*.
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> . . .
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> In short, the challenged conduct by Blue Cross is not governed by *Albrecht* and *Kiefer-Stewart*, but is *sui generis*. Although the pharmacy agreements do fix prices, and are not precisely between seller and purchaser (but between seller and indemnitor), they are not manifestly anticompetitive. Nor do we find that the pharmacy agreements at isuse here "on [their] face [have] the effect, or could have been spurred by the purpose, of restraining competition among the

individual [pharmacies]." *Broadcast Music, Inc.*, 441 U.S. at 13, 99 S. Ct. at 1559.

Accord, Pennsylvania Dental Association v. Medical Service Association of Pennsylvania, 745 F. 2d 248, 256-59 (3d Cir. 1984).

Simply stated, the Courts below—like the Circuit and District Courts in *Medical Arts, Sausalito Pharmacy* and *Feldman*—correctly recognized that although a determination that Blue Shield is the purchaser precludes application of the *per se* rule, it does not follow that if Blue Shield instead is characterized as an indemnitor, the *per se* rule then applies. Because under either characterization Blue Shield neither sells prescription pharmaceuticals to pharmacies nor competes with them, the Pharmacy Agreement is not the type of arrangement to which this Court has applied the *per se* rule, and the Courts below, like the Courts in *Medical Arts, Sausalito Pharmacy* and *Feldman*,[14] thus properly declined Petitioners' invitation to expand the parameters of *per se* liability.[15]

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[14] In light of the fact that the Courts in *Medical Arts, Sausalito Pharmacy* and *Feldman* characterized the plans involved therein as "virtually identical" to the plan *sub judice*, and, indeed, specifically relied both on this Court's decision in the prior appeal of the present case, as well as on the Justice Department's *Amicus* Brief filed therein, *see Sausalito Pharmacy*, 544 F. Supp. at 233, *aff'd*, 677 F.2d 47; *Medical Arts*, 518 F. Supp. at 1109, 1110 n.10; 675 F.2d at 505; *Feldman*, 562 F. Supp. at 946 n.3, 948, Petitioners' conclusional suggestion that those cases are distinguishable (Pet. at 23 n.6) cannot withstand scrutiny.

[15] For the same reason, Petitioners' argument that "non-competitors are not exempt from the Sherman Act" (Pet. at 18) is irrelevant. It is one thing to acknowledge that participation by a non-competitor in an otherwise unlawful combination will not save the arrangement from a finding of illegality. It is, of course, quite another to suggest—as Petitioners apparently seek to do—that participation by a non-competitor in an otherwise *lawful* arrangement somehow mandates a finding of illegality. Similarly, Petitioners' suggestion that the Fifth Circuit held that price fixing is lawful absent proof of monopoly power (Pet. at 25) is,

B. Group Boycott

Petitioners' alternate *per se* theory is one of "group boycott." Petitioners argue that because, under the Pharmacy Agreements, it is economically more advantageous for insureds to patronize participating, rather than non-participating, pharmacies, Blue Shield has entered into a *per se* unlawful combination with its insureds to boycott non-participating pharmacies. The Courts below likewise properly rejected this theory. As both Courts noted, it is undisputed that Blue Shield always has offered the Pharmacy Agreement to all licensed pharmacies in the State of Texas, and that non-participating pharmacies do not deal with Blue Shield because *they* have chosen not to do so (Pet. App. at 10-11, 26).

In light of such uncontroverted facts, Blue Shield's unilateral insistence on certain terms in its contract with Participating Pharmacies is not the type of conduct to which the *per se* rule has been applied, and again, Petitioners have failed to identify contrary authority. Indeed, courts assessing boycott allegations leveled against similar plans have rejected Petitioners' position. For example, in *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982), the Seventh Circuit upheld summary judgment in favor of an auto repair insurance plan against the claim that the plan constituted a group boycott. Finding that although some repair shops that refused to accept the reimbursement rates offered by the insurers "may suffer some economic losses, these losses appear basically to be the result of the shops' inability or unwillingness to meet competition," the Seventh Circuit held that "the district court properly concluded that

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charitably, an arrant mischaracterization of that Court's opinion, which holds simply that *absent* price fixing, *and absent* proof of monopoly power, "Blue Shield has the clear right to bargain for the lowest price and best deal for itself and its customers/insureds" (Pet. App. at 24).

defendants' actions do not constitute an unlawful boycott and granted summary judgment on this claim." 660 F.2d at 1206. *Accord, Pennsylvania Dental Association v. Medical Service Association of Pennsylvania*, 745 F.2d 248, 259-60 (3d Cir. 1984). Because these principles are fully consistent with this Court's recognition that, absent concerted action or abuse of monopoly power, it is not unlawful to insist on standard terms in commercial dealings, *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), no issue appropriate for certiorari is presented.

II. THE COURTS BELOW CORRECTLY CONCLUDED THAT PETITIONERS DID NOT RAISE OR PURSUE A CLAIM UNDER THE RULE OF REASON

Under a rule of reason analysis, the Court must weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). This analysis requires a review of the facts peculiar to the business, the history of the challenged arrangement and the reasons why it was adopted. In short, the arrangement's overall impact on competitive conditions, rather than a plaintiff's claimed individual injury, is the determinative factor. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

The Complaint in the present case alleges only that the prepaid prescription drug plan is illegal *per se* as price fixing and a group boycott. Similarly, as both the District Court and the Court of Appeals acknowledged, throughout the entire course of this litigation Petitioners have ardently and consistently disavowed any intention to proceed under the rule of reason, and as late as the hearing on the motions for summary judgment Petitioners reiterated their decision to proceed solely on the theory of *per se* illegality. As the District Court noted, Petitioners —like the plaintiffs in *Medical Arts*—"have placed all

their eggs in the *per se* basket" (Pet. App. at 8), *quoting* 518 F. Supp. at 1109. The Court of Appeals agreed: "The plaintiffs have pled and tried this case as a *per se* case" (Pet. App. at 24).

Assuming *arguendo*, as did the District Court and the Court of Appeals, that Petitioners intended to pursue a rule of reason claim, both Courts properly held that Petitioners failed to raise a genuine issue of material fact thereunder. In the face of Respondents' summary judgment proof, which set forth competitive justifications in support of the plan, Petitioners eschewed the opportunity to come forward with evidence to support their conclusional claim that the alleged price fixing "eliminates competition." As the Court of Appeals noted, "[e]ven if the complaint be broadly construed to allege predatory pricing or monopoly pricing by an insurer with dominant power in the drug-purchasing market, the plaintiffs' case fails under the rule of reason, for they have presented no evidence that goes beyond 'unsupported conjecture' as to either of these theories, and hence cannot forestall summary judgment," (Pet. App. at 25), *citing Walker v. U-Haul Co. of Mississippi*, 734 F.2d 1068, 1072 (5th Cir. 1984).[16] Because Petitioners neither attempted to show what portion of total prescription drug sales are made under the Pharmacy Agreements, nor adduced any other evidence of market power or anticompetitive effects, the Courts below correctly determined that Petitioners failed to raise an issue under the rule of reason. Again, this result is fully supported by *Medical Arts, Sausalito Pharmacy* and *Feldman*, and Petitioners have cited no contrary authority. Accordingly, review on certiorari is not warranted.

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[16] In addition, Petitioners eschewed the opportunity to allege or adduce evidence in support of a claim of predatory pricing by pharmacies, which, as the Government noted in its *Amicus* Brief, is the one instance in which the interests of Blue Shield and the pharmacies theoretically might converge (*Amicus* Brief at 14 n.6.)

CONCLUSION

For the foregoing reasons, the Petition For a Writ of Certiorari should be denied.

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